IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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SUPREME COURT, U.S.

NO. 83-6611

THOMAS HENRY GIBSON, Petitioner,

vs.

STATE OF IDAHO, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF

THE STATE OF IDAHO

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The petitioner, Thomas Henry Gibson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Idaho, entered in this proceeding on December 15, 1983, for which rehearing was denied on February 14, 1984.

OPINION BELOW

The opinion of the Idaho Supreme Court appears in the Appendix hereto, Appendix "B"1-30, and is reported as State of Idaho v. Thomas Henry Gibson, 675 P.2d 33 (Idaho 1983).

JURISDICTION

The judgment of the Supreme Court of the State of Idaho was entered on December 5, 1983. A timely petition for rehearing was denied on February 14, 1984. This court's jurisdiction is made under 28 U.S.C. §1257(3). Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The certificate of mailing of counsel of record is forwarded to the court simultaneously herein.

QUESTION PRESENTED

1. Did the use of evidence of another crime of which petitioner was acquitted, violate the principle of double jeopardy?

2. Does Idaho's statutory procedure for imposing a death sentence by judge rather than by jury violate the Sixth and Eighth Amendments of the United States Constitution?

3. Was the evidence of petitioner's involvement in the murder sufficiently aggravating to justify the death sentence under the principles of Enmund v. Florida, 458 U.S. 782 (1982) and Gregg v. Georgia, 428 U.S. 1563 (1976)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States. It further involves Idaho's statutory capital punishment scheme, which provides in pertinent part that the death penalty decision shall be reached by the court rather than the jury. These include:

Idaho Code §19-2515:

> (a) After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.
>
> (b) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.
>
> (c) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the

offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(d) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumsances found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(e) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(f) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for

remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e), or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

Idaho Code §19-2827:

> Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Idaho and to the attorney general together with a notice prepared by the clerk and a report prepared by the trial judge seting forth the findings required by section 19-2515(d), Idaho Code, and such other matters concerning

the sentence imposed as may be required by the Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and punishment prescribed. The report may be in the form of a standard questionaire prepared and supplied by the Supreme Court of Idaho.

(b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

(g) The Supreme Court shall collect and preserve the record of all cases in which the penalty of death was imposed from and including the year 1975.

Idaho Code §18-4001:

Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill.

Idaho Code §18-4002:

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the lfe of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Idaho Code §18-4003:

(a) All murder which is perpetuated by means of poison, or lying in wait, or torture, when torture is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetuated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

(b) Any murder of any peace officer, executive officer, officer of the court, fireman, judicial officer or prosecuting attorney who was acting in

the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murdr to an officer so acting, shall be murder of the first degree.

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

(f) Any murder committed by a person while escaping or attempting to escape from a penal institution is murder of the first degree.

(g) All other kinds of murder are of the second degree.

Idaho Code §18-204:

All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen (14) years, lunatics, or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command or coercion, compel another to commit any crime, are principals in any crime so committed.

STATEMENT OF THE CASE

The basic facts of the instant case were adequately expressed by the Idaho Supreme Court, as follows:

The circumstances surrounding the crime are largely without challenge except as to the

location of and who did the actual killing. Some of themost damaging testimony came from the defendant Gibson himself who testified at trial. Gibson was charged with the first degree murder of Kimberly Ann Palmer. Palmer and a friend, Scott Currier, were in Spokane, Washington, where Currier had met members of a motorcycle group. On June 19, 1980, Palmer and Currier left for a camping trip in a blue and white van. On Friday, June 20, Currier and Palmer checked into a Spokane motel which was located a short distance from the residence of Donald Paradis; they immediately checked out of the motel, with Currier stating that his guns had been stolen, that he knew who did it, and that he was going to retrieve them.

Gibson testified that in the early morning hours of June 21, he, Paradis, and Larry Evans, among others, were at the Paradis residence when Currier and Palmer arrived. A fight erupted and Gibson testified that he watched Paradis beat Currier to death with a baseball bat. Gibson testified that he left for a short time, and upon returning found Currier lying on the floor dead or dying. Gibson testified that he saw Kimberly Palmer running out of the house and "as she ran by me I grabbed her, pulled her down to the floor and hit her and knocked her out" because he was afraid she would be calling for help. Gibson testified that he then moved Palmer to the kitchen, put her on the floor, took her pulse, determined that she was still alive, and related that to Larry Evans and that Evans then choked Palmer to death. Gibson testified that he watched the choking and thereafter determined that Palmer was dead.

Gibson testified that he and another placed Currier's body in a blue sleeping bag while Paradis and Evans placed the Palmer body in a red sleeping bag. The bodies were then placed in the blue and white van, which was driven to a remote area just outside of Post Falls, Idaho. Other testimony indicated that at approximately 6:30 a.m. that Saturday morning, the blue and white van was observed driving up a steep mountain road in a sparsely populated area south of Post Falls, Idaho. Two or three men were in that van, one of whom was wearing a distinctive cap. Gibson testified that the blue and white van stalled going up a hill, rolled backwards and overturned. Gibson stated that he stayed in the van while Paradis moved the body of Kimberly Palmer and Evans moved the body of Scott Currier. The van was then pushed over, abandoned, and Gibson, Paradis and Evans walked back to Post Falls. Gibson stated that he

was carrying a rifle rolled up in a blue blanket.

Other testimony placed three men of the general description of Gibson, Paradis and Evans walking down that road towards Post Falls, Idaho that same morning. The men were all strange to the area and one was carrying a rolled up blue blanket. Three men of the same description were observed entering Post Falls that morning, and they were questioned by the police in Post Falls. One of those men was identified as Gibson and he was carrying a rolled up bl blanket. Another of the three men was identified as Paradis.

Later that day, the blue and white van was seen turned on its side with debris scattered just off that mountain road. Upon investigation, the body of Kimberly Palmer was found face down in a small stream nearby and the body of Scott Currier was found inside a sleeping bag. Currier's body was bound with pieces of terrycloth and had been bleeding. A distinctive belt buckle worn by Currier had been cut off. Palmer was found to have been strangled to death.

In the early morning hours of Sunday, June 22, the Paradis residence in Spokane was severely damaged by a fire caused by arson. In the basement of that house was found a rolled up rug, in which were found Currier's missing belt buckle, a lawn dart with traces of blood which matched puncture wounds in Currier's back, and a piece of blue terrycloth which matched the terrycloth found with the body of Currier.

On Monday, June 23, Gibson and a friend left the area; they were apprehended in northern California on June 25. Gibson gave a false statement to California authorities before being returned to the State of Washington where he was charged with the murder of Scott Currier. Following trial, he was acquitted of that charge and extradited to Idaho for the murder of Kimberly Palmer.

At trial, a major issue was raised concerning Idaho's jurisdiction over Gibson and, therefore, much of the State's case consisted of autopsy evidence which showed that the varying state of body decomposition indicated that Currier had been killed some hours before Palmer, and water in Palmer's lungs indicated that Palmer had actually been killed in the streambed in Idaho. That evidence, of course, contradicted of the testimony of Gibson that Palmer had been killed in the Paradis' residence in the State of Washington.

The State of Washington tried Gibson for the mur-

der of Scott Currier. He was acquitted. The State of Idaho then prosecuted Gibson and Donald Paradis for the murder of Kimberly Palmer. After separate trials, both were convicted of first degree murder.

Under Idaho's capital punishment statute, whoever acts as the trial judge determines whether the death sentence is imposed. Briefly stated, the statute, Idaho Code §19-2515, requires the trial judge to find a statutorily defined aggravating circumstance. The finding must be beyond a reasonable doubt. If the judge believes the aggravating circumstance exists, the death sentence is to be imposed, unless the judge believes there is a mitigating circumstance that "outweighs the gravity of any aggravating circumstance".

The trial judge found an aggravating circumstance in Gibson's case. The judge believed that Gibson, "by murder, and the circumstances surrounding its commission", exhibited utter disregard for human life. Appendix "A"-1-20.

In his brief to the Idaho Supreme Court, Petitioner asserted that a defendant is entitled to jury participation in the capital sentence process. Appendix "F", Brief of Appellant, pp. 18-38. The Idaho Supreme Court rejected the analysis. "Our late cases of State v. Sivak, _____ Idaho _____, and State v. Creech, _____ Idaho _____, 670 P.2d 463 (Id. 1983), are dispositive." Appendix "B", p. 12.

REASONS FOR GRANTING THE WRIT

1. The use of evidence of another crime of which Petitioner was acquitted violates the principle of double jeopardy.

The issue presented herein is one of constitutional significance which requires this Court's resolution. The basic question is whether evidence of an offense the defendant was acquitted of may be used against him in a subsequent prosecution.

Evidence of Scott Currier's murder was a major part of the prosecutor's case against Thomas Gibson. Physical evidence found at the Washington murder scene, as well as photographs of Currier's body, were introduced as evidence. The same evidence had been used in the Washington trial.

Prior to trial, Gibson moved the trial judge to exclude all evidence of Scott Currier's murder. No ruling was made until defendant renewed it by way of an objection at trial. The trial judge denied the motion. Throughout the trial, objections were made relating to the murder of Scott Currier: the admission of Plaintiff's Exhibits 92, 93, and 95, pictures of Currier's body, Tr. Vol. II, p. 341, p. 581, the cloth found around Currier's neck , Plaintiff's Exhibit 147, and cloth found at the Dearborn residence in Spokane, Plaintiff's Exhibit 149, Tr. Vol. IV, p. 694, hair found at the Dearborn residence, Plaintiff's Exhibit 60 and sample of Scott Currier's hair, Plaintiff's Exhibit 145, Tr. Vol. IV, p. 697, Currier's jeans and belt, Plaintiff's Exhibits 13 and 12, Tr. Vol. IV, p. 703,

and finally autopsy pictures of Currier, Plaintiff's Exhibits 142, 143, and 144, Tr. Vol. IV, pp. 779-780.

Two conflicting points of view have developed under Ashe. See, Admissibility of evidence as to other offenses as affected by defendant's acquittal of that offense, 86 ALR2d 1132 (1962, Supp. 1983). As expressed in Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972):

> It is fundamentally unfair and totally incongruous with our basic concept of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury.. has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surrounds an accusation...

Cf. Note, Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant has been Acquitted, 2 Fla. St. U.L. Rev. 511 (1974).

Similarly, the Third Circuit Court of Appeals has favored broad application of collateral estoppel in criminal cases. United States v. Keller, 624 F.2d 1154, 1160 (3d Cir. 1980). Accord United States v. Mespoulede, 597 F.2d 329 (2dCir. 1979). In Keller, a defendant charged with conspiracy to distribute PCP had been acquitted of participating in other drug transactions after the end of the conspiracy. As the court noted:

> The Government contends that collateral estoppel is inapplicable because "[i]t is not the result of the prior case that was material, but rather the facts which were disputed." Government

> Brief, page 11. Thus, the Government would have us hold that the prior conduct is admissible notwithstanding the determination by the earlier fact finder that the defendant's state of knowledge and level of participation did not satisfy the requirement of the criminal law. See United States v. Phillips, 401 F.2d at 305. We decline to so hold since that would eviscerate the effect of the prior acquittal.

624 F.2d at 1160. In the case at bar, the State made an argument quite similar to that presented in Keller.

As the Second Circuit Court of Appeals noted with respect to Wingate v. Wainwright:

> The court held that it was irrelevant that the relitigated issue was an "evidentiary" fact rather than an "ultimate" fact in the new trial. As in the case before us, the relitigated facts were offered into evidence to prove that the defendant committed a different offense, but failure to prove the prior criminal acts beyond a reasonable doubt would not preclude a conviction. The essential point is that the defendant must defend against charges or factual allegations that he overcame in the earlier trial, just as if that trial had never taken place.

United States v. Mespoulede, 597 F.2d 329, 335 (2d Cir. 1979) (citation omitted, emphasis added). As the court also stated: "An acquittal in a criminal case would no longer serve to clear a man's name; rather, a permanent stigma would remain, a pall cast over his reputation." 597 F.2d at 335, fn. 9

The other view has been expressed by the Ninth Circuit Court of Appeals as follows:

> [W]e perceive no compelling reason to engraft upon this rule a limitation that would prevent

> the introduction of such evidence in any instance simply because of the added factor of acquittal. To the contrary, we believe that despite the acquittal the matter of admission or rejection is and should be addressed to the sound discretion of the trial judge, lowers the scale to the side of inadmissibility of such evidence.

State v. Little, 87 Ariz. 295, 350 P.2d 756, 763 (1960). Accord State v. Perkins, 349 So.2d 161, 163 (Fla. 1977).

Other jurisdictions have concluded that the fact of acquittal does not impact the admissibility of the prior offense but relates to the weight of the evidence. See Jenkins v. State, 147 Ga.App. 21, 248 S.E. 2d 33 (1978); Ladd v. State, 568 P.2d 960 (Alaska, 1977). Thus, even if the evidence of a prior crime is material to the crime charged, it must be excluded where its prejudicial impact substantially outweighs its probative value. People v. Corbeil, 77 Mich.App. 691, 259 N.W.2d 193, 195 (1977). Accord People v. Atkins, 96 Mich.App. 672, 293 N.W.2d 671, 675-676 (1980); People v. Milano, 59 A.D.2d 852, 399 N.Y.S.2d 226, 227 (1977); Stuart v. State, 561 S.W.2d 181, 182 (Tex.Cr.App., 1978).

In light of the conflict among various jurisdictions, it is important that this Court resolve the question.

> 2. Idaho's statutory procedure for imposing a death sentence, by judge rather than by jury, violates the Sixth and Eighth Amendments of the United States Constitution.

The issue presented herein is of constitutional

significance and requires this Court's consideration. Of the five states which gave the jury no formal role in the capital sentencing scheme--Arizona, Idaho, Montana, Nebraska, and Oregon--only Oregon has concluded that judicial sentencing is unconstitutional [State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981)]. Ariz. Rev. Stat. Ann. §13-703 was upheld in State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983) cert. denied ___ U.S. ___, 103 S.Ct. 2444 (1983) while Mont. Code Ann. §46-18-301 was ruled constitutional in Fitzpatrick v. State, ___ Mont. ___, 638 P.2d 1002 (1982), after remand, ___ Mont. ___, 671 P.2d 1 (1983). Nebraska's judicial sentencing scheme has been ruled constitutional by its state supreme court as well. State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982) cert. denied 456 U.S. 984 (1982); State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977).

The Idaho Supreme Court, commencing with State v. Creech, ___ Idaho ___, 670 P.2d 463 (1983), has held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states."

The conflict among the states which permit judicial sentencing is not the sole justification for this Court's exercise of jurisdiction in this matter. The question of extending the Sixth Amendment right to capital sentencing is one of great importance to the

several convicts awaiting administration of the death sentence in the states of Idaho, Arizona, Montana, and Nebraska. Further, the previous decisions of this Court reflect the error in reasoning of those courts which have upheld the judicial sentencing scheme.

The Sixth Amendment to the Constitution of the United States assures that

> [T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury,...

Since the trial is not terminated until the sentencing process and in light of the serious nature of capital sentencing, defendant asserts that his constitutional rights were violated when the trial judge determined sentencing in this capital case.

The issue of jury participation in capital sentencing was raised but not addressed by the United States Supreme Court in <u>Lockett v. Ohio</u>, 438 U.S. 586 (1978). Justice Rehnquist did discuss the jury's role in his dissenting opinion, stating:

> [T]his Court "has never suggested that jury sentencing is constitutionally required." No majority of this Court has ever reached a contrary conclusion, and I would not do so today.

438 U.S. at 633.

Justice Rehnquist's position was based on the Court's earlier statement that while "jury sentencing in a capital case can perform an important societal function...it has never [been] suggested that jury sentencing is constitutionally required." <u>Proffitt v. Florida</u>, 428 U.S. 242, 252 (1976). The significance of

this passage from Proffitt is reduced since the Florida procedure considered in Proffitt did not completely exclude the jury from the capital sentencing process. The jury was responsible for recommending either life imprisonment or the death penalty, although its role was only advisory. FSA §921.141. As a result, the implication that no constitutional provision mandates jury participation in capital sentencing should be viewed as dicta. Further, Justice Rehnquist's analysis of the Proffitt language must be viewed in light of his consistent dissent from the Court's close scrutiny of death penalty legislation. See Lockett v. Ohio, supra; Woodson v. North Carolina, 428 U.S. 280, 308 (1976); Furman v. Georgia, 408 U.S. 238, 265 (1972). The fact that the vast majority of states require jury participation in capital sentencing carries some weight in the determination whether jury involvement at sentencing is constitutionally required. Gregg v. Georgia, 428 U.S. 153, 179-181 (1976); Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

In 1972, this Court declared the Georgia and Texas capital punishment statutes unconstitutional in Furman v. Georgia, supra. The Court ruled that the procedures by which the defendants were selected for the death penalty were constitutionally inadequate because of the jury's unfettered discretion to impose the death penalty. Following Furman, more than two-thirds of the states reenacted some form of the death penalty. The Court's first opportunity to review these new statutes came in 1976.

In Gregg v.Georgia, supra, this Court acknowledged the role of the jury in capital sentencing. As stated:

> Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant the application of the Eighth Amendment.

428 U.S. at 173. The jury role in capital sentencing is necessary "to maintain a link between contemporary community values and the penal system--a link which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" 428 U.S. at 190 (citation omitted).

Since the Eighth Amendment stands to assure that the State's power to punish is "exercised within the limits of civilized standards," the jury is needed to help set those standards. Woodson v. North Carolina, 428 U.S. 180, 188 (1976). In Woodson, the Court described three indicia of societal values with respect to sentencing--history and traditional useage, legislative enactments, and jury determinations. Id. As stated at page 295:

> In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court observed that "one of the most important functions any jury can perform" in exercising its discretion to choose "between life imprisonment and capital punishment" is "to maintain a link between contemporary community values and the penal system." Id. at 519, and n. 15.

The reference to Witherspoon underscores the fundamental nature of the jury's involvement in capital punishment sentencing schemes. At issue in Witherspoon

was whether a juror could be dismissed for cause after indicating on voir dire that he might be hesitant to return a death verdict. Ruling that such a process deprived the defendant of an impartial jury, this Court noted:

> And one of the most important functions any jury can perform in making such a selection, [between life and death] is to maintain a link between contemporary community value and the penal system....

Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Witherspoon's emphasis on a maximum cross section of community viewpoints for the jury panel was based on the premise that the jury represents a composite of society. Witherspoon observed that less than half of the American public believed in the death penalty. 391 U.S. at 520. As a result, a jury process which routinely excluded all those in the majority who did not favor capital punishment did not properly reflect the views of the whole community.

In Adams v. Texas, 448 U.S. 38 (1980, the Witherspoon rationale was extended to the sentencing phase of a bifurcated capital trial. The Court struck down a provision which provided that a prospective juror would be disqualified unless he stated "under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Tex. Penal Code Ann. §12.31(b) (Supp. 1980). As in Witherspoon, the rationale for the decision was that the lack of a representative cross-section of the

community resulting from such a procedure deprived the defendant of his right to an impartial jury. As observed, at page 49:

> Despite the hypothetical existence of the juror who believes literally in the Biblical admonition "an eye for an eye." See Witherspoon v. Illinois, supra, at 536 (Black, J. dissenting), it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment.

Although the above-cited decisions stop short of holding that a jury is constitutionally required at sentencing, their import is clear. A defendant in a capital case is entitled to the widest possible cross-section to determine his fate. When the sentencing is determined solely by the trial judge, the decision whether a defendant lives or dies is made by one individual instead of twelve diverse personalities. The jury acts as "an essential continuing barometer of society's willingness to allow a death penalty statute to remain in effect." S. Kauter, Brief Against Death: More on the Constitutionality of Capital Punishment in Oregon, 17 Will. L. Rev. 629, 658-659 (1981). All of these policy considerations combine to create a strong argument under the Sixth and Fourteenth Amendments and the Eighth and Fourteenth Amendments that a defendant is entitled to jury participation in the capital sentencing process.

In light of the conflict among the states and the absence of a direct ruling by this Court on the issue

of jury participation in capital sentencing, this Court should grant certiorari to review the judgment below.

> 3. The evidence of Petitioner's involvement in the murder was not sufficiently aggravating to justify the death sentence under the principles of Enmund v. Florida, 458 U.S. 782 (1982) and Gregg v. Georgia, 428 U.S. 1563 (1976).

Thomas Gibson was acquitted of murdering Scott Currier and convicted of murdering Kimberly Palmer. Gibson testified at his second trial that he was present when other members of a motorcycle gang killed Currier. After Currier's death, Palmer tried to run away. Gibson grabbed her, knocked her unconscious, and then watched as another man strangled her.

The trial judge wrote after the trial that "the jury might well have concluded that the events occurred just about as the defendant [Gibson] had related them except that they occurred in Idaho and not in Washington." Appendix "A"-18. The trial judge also believed:

> [T]he jury could have, and likely did, find that the defendant [Gibson] aided and abetted in Palmer's death and, consequently, was guilty as a principal pursuant to the provisions of I.C. 18-402 [sic].

Appendix "A"-6 (emphasis added). The citation to the Idaho Code should be I.C. 18-204, which is set forth herein.

Sentencing Thomas Gibson to death, under these facts, is contrary to the Court's rulings in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and Gregg v.Georgia, 428 U.S. 1563, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In Gregg, this Court upheld Georgia's capital punishment statute and ruled that the death penalty does not invariably violate the United States Constitution, 428 U.S. at 170, 96 S.Ct. at ___, 49 L.Ed.2d at 872. The Gregg decision also said that capital punishment "is an extreme sanction, suitable to the most extreme crime." Id. at 188, 96 S.Ct. at ___, 49 L.Ed. 2d at 882.

The holding in Enmund v. Florida, is that an accomplice in a felony murder, who did not kill or attempt to kill, and who did not intend the death of the victim, cannot be sentenced to death. 458 U.S. 782 at 802, 102 S.Ct. 3368 at 3379, 73 L.Ed.2d 1140 at 1154 (1982). While the facts in Enmund are not identical to those in Thomas Gibson's case, the issue is similar.

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence...

Id at 799, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152 (citations omitted).

Contrary to the principles of Enmund and Gregg, the trial judge imposed the death sentence on Thomas Gibson. The judge believed that Gibson showed utter disregard for life "by his actions, by the murder, and by the circumstances surrounding its commission." Appendix "A"-10. But the individual actions of Thomas

Gibson are not extreme, and the judge's consideration of the other actors and the other murder denied Gibson's right to "individualized consideration."

CONCLUSION

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

Michael Vrable

MICHAEL J. VRABLE
307 Elder Building
Coeur d'Alene, ID 83814
Counsel for Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff,	)	Case No. F29470
vs.	)	FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE
THOMAS HENRY GIBSON, Defendant.	)	

The above defendant having been found guilty by a jury by verdict rendered on June 30, 1981, of the crime of MURDER IN THE FIRST DEGREE, an offense for which the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation and thereafter having held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW, THEREFORE, the court hereby makes the following findings:

1. Conviction. That the defendant, while represented by court appointed counsel, was found guilty of the offense of Murder In The First Degree by jury verdict rendered on June 30, 1981.

2. Presentence Report. That a presentence report, including a report of mental evaluation of the defendant, was pre-

pared pursuant to Orders of the court and copies thereof were delivered to the defendant or his counsel, as well as to counsel for the plaintiff, at least seven (7) days prior to the sentencing hearing pursuant to Section 19-2515, Idaho Code, and the Idaho Criminal Rules. That both plaintiff and the defendant have filed herein written acknowledgments of such receipt of copies of said presentence report and all portions thereof.

3. Notice of Intent To Recommend Death Penalty. That, pursuant to Order entered herein on September 15, 1981, plaintiff filed herein a written notice of its intent to seek and recommend the imposition of the death penalty; that a true and correct copy of said notice was timely served upon counsel for the defendant.

4. Notice of Aggravating Circumstances. That, pursuant to Order entered herein on September 15, 1981, plaintiff filed herein a written enumeration of aggravating circumstances which it intended to prove pursuant to the provisions of Idaho Code Section 19-2515 in order to justify its recommendation of the death penalty; that a true and correct copy of said notice was timely served upon counsel for the defendant.

5. Notice of Mitigating Circumstances. That, pursuant to Order entered herein on September 15, 1981, defendant filed herein a pre-sentence statement enumerating mitigating factors and circumstances which defendant intended to rely upon in opposing imposition of the death penalty.

6. Sentencing Hearing. That, pursuant to Order entered September 15, 1981, a true and correct copy of which was timely served upon counsel for plaintiff and for the defendant, sentencing hearing commenced to be heard on October 13, 1981, and was concluded on October 15, 1981; that, at said hearing, in the presence of the defendant, the court heard relevant

evidence in mitigation of the offense and arguments of counsel, the plaintiff having presented no evidence at such hearing but having advised the court that it was relying upon the evidence admitted at trial.

7. Facts and Argument Found in Mitigation. The defendant has filed with the court a list of those mitigating factors which the defendant contends preclude imposition of the death penalty. These are considered herein below in the order presented by the defendant.

a. Lack of previous felony convictions. It is specifically found that the defendant has not previously been convicted of a crime amounting to a felony. The defendant's prior criminal record consists of a considerable number of convictions for crimes which are commonly classified as "traffic offenses". While there are a number of reported criminal charges for offenses of a more serious nature, including crimes relating to unlawful use of controlled substances, the actual record of prior convictions for other than minor offenses is non-existent. There is, therefore, no significant history of prior criminal activity disclosed by official records, and this is deemed by the court to be a mitigating factor in considering the imposition of the death penalty.

It should be noted, however, that, while the defendant was found not guilty of Murder In The First Degree in the State of Washington on a charge relating to the death of one Scott Currier (and arising out of facts and circumstances very closely related to the facts and circumstances involved herein), the defendant admitted during the trial held herein that he was present at the time one Donald Paradis, together with others, killed Scott Currier in a very brutal manner. The defendant denies participation in such act, however.

b. Age. The defendant is 30 years old. This fact,

in and of itself, is unremarkable and is not found to be a mitigating circumstance.

c. Military record. The defendant enlisted in the United States Marine Corps on August 2, 1968, and was honorably discharged therefrom at the expiration of his obligation on July 30, 1971. Initially, the defendant did well in the military service, advancing quite rapidly in rank. Following the death of the defendant's father in September of 1969, and during a time when his mother's health was deteriorating, the defendant unsuccessfully sought a hardship discharge. The defendant's military records contain under a notation entitled "mental status" a judgment of "passive aggressive personality" and references to a considerable dislike for the military service. The court finds that the defendant's military record is not a mitigating factor in considering whether or not the death penalty should be imposed in this case.

d. Family background. As reported in the presentence report, the defendant has an older brother and sister and two younger sisters, non of whom are reported to have any prior significant criminal record, and all of whom are supportive of the defendant. The defendant's father died in September of 1969; the defendant's mother died in March of 1970. While the defendant describes his childhood as being very good and the family is described as being "close-knit", it is apparent that the defendant suffered a certain amount of emotional deprivation, particularly with respect to his relationships with his father and with his peer group. The defendant ultimately became involved in numerous minor juvenile problems, run away situations, involvement with controlled substances, and, finally dropped out of school and joined the Marine Corps at age 17. The court finds nothing in the defendant's family background which

it considers to be a mitigating circumstance which would render unjust the imposition of the death penalty in the event that a statutory aggravating circumstance should be subsequently found.

e. Defendant's trial testimony. During the trial, the defendant elected to testify on his own behalf. The defendant testified that on June 21, 1980, he was present at a certain house located in Spokane, Washington, which house was then being rented by Donald Paradis. Also present were Paradis, a Charles Amacher, a Larry Evans and two females. Scott Currier and Kimberly Palmer (the victim involved herein) came to the house. Currier accused Paradis of stealing a gun, which resulted in a fight between Currier, on the one side, and Paradis, Amacher and Evans, on the other. The "fight", in turn, resulted in the killing of Currier. . . he was viciously beaten to death. The defendant denied any involvement in the death of Currier, testifying that he was trying to get his girlfriend (now wife) out of the house. Subsequently, the defendant went into the basement where he observed the body of Currier who was either dead or dying. He returned upstairs and, at this point, Kimberly Palmer came running by trying to get out of the house. The defendant hit her with his fist, knocking her unconscious. He drug her into the kitchen and felt for a pulse. At this point the defendant said that he advised Larry Evans that "She's still alive". Larry Evans then proceeded to strangle the unconscious Palmer.

In sum, the defendant testified that, although he struck Palmer, rendering her unconscious, he did not kill her; furthermore, Palmer died in Washington and not in Idaho.

Clearly, the jury had to disregard at least that portion of the defendant's testimony which related to the place of death

in order for it to have returned its verdict herein. The court is not unmindful that the jury might not have been nearly as concerned with the jurisdictional aspects of the situation as would be the court. Nevertheless, it is apparent that the jury did render its verdict in accordance with the plaintiff's argued theory of the case, i.e., that the strangulation and death of Palmer occurred in Idaho and not in Washington.

Having concluded that the incident occurred in Idaho, the jury might then have determined that the defendant did indeed strike Palmer, rendering her unconscious as he said he did, followed by her strangulation by Evans (the evidence at trial was to the effect that a hat identified as belonging to Evans was found beneath Palmer's body). In short, the jury could have, and likely did, find that the defendant aided and abetted in Palmer's death and, consequently, was guilty as a principal pursuant to the provisions of I. C. 18-402.

In any event, the testimony of the defendant can hardly be considered as a mitigating factor and it is not found to be such.

f. <u>Polygraph examination</u>. No evidence or argument was presented by the defendant at the hearing to support this listed mitigating circumstance.

g. <u>Testimony of C. Gordon Edgren, M.D., FAPA</u>. Dr. Edgren conducted a mental evaluation of the defendant pursuant to the court order and as a part of the presentence investigation. He also testified on behalf of the defendant at the aggravation - mitigation hearing. The court has considered the report of Dr. Edgren submitted as a part of the presentence report, and, of course, heard his testimony. While Dr. Edgren's findings and opinion certainly go far to explain why the defendant came to become involved in the situation which has led to his conviction

for the crime charged, the court finds nothing therein which can be considered a mitigating circumstance.

h. Testimony of Cal Henderson. No such testimony was presented to the court.

In addition to the mitigating circumstances urged by the defendant and discussed above, the court has considered the following potential mitigating curcumstances:

a. Mental or emotional state at the time of the murder. There is no evidence to suggest that the defendant was influenced by any extreme mental or emotional disturbance at the time of the murder.

b. Capacity to appreciate criminality of conduct or to conform conduct to the requirements of law. There is no evidence to suggest that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was in any way impaired by mental disease or defect or by intoxication. There is a reference in the presentence report to the effect that the defendant's use of controlled substances may have contributed to his involvement in the situation leading to his conviction, but there has been no evidence presented to the court to the effect that the defendant was either intoxicated or using controlled substances at the time of the commission of the murder.

c. Extent of cooperation with police. There is no evidence that the defendant has cooperated with the police. At the time of the trial held in the State of Washington and involving the death of Scott Currier, the defendant considered testifying for the prosecution. Such testimony quite likely would have changed the result of that trial; the defendant elected not to testify.

8. Facts and Argument Found in Aggravation. Pursuant to Order entered on September 15, 1981, the plaintiff has filed herein a document stating which of the aggravating circumstances enumerated in Idaho Code Section 19-2515(f) upon which it was relying to justify the imposition of the death penalty. That document, which was filed prior to the holding of the aggravation - mitigation hearing, states that the State relies upon and intends to prove the statutory aggravating circumstances set forth in subsections (6), (8), and (10) of Idaho Code Section 19-2515(f). At the time of the hearing, the State orally advised in open court that it was withdrawing any contention that the evidence would sustain a finding under Idaho Code Section 19-2515 (f)(10), and, consequently, no further consideration will be given to any such claims.

It is the plaintiff's position that the evidence shows beyond a reasonable doubt, that:

(1) By the murder, or the circumstances surrounding its commission, the defendant exhibited utter disregard for human life; (I.C. 19-2515(f)(6), and,

(2) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit a murder which will probably constitute a continuing threat to society. (I.C. 19-2515(f)(8).

In support of its position, the plaintiff has set forth in its written enumeration of such claimed aggravating circumstances a brief statement of the reasons for the contention that such aggravating circumstances should be found by the court. The State augmented such statements by argument at the hearing.

The court chooses to first address the contention that the evidence shows, beyond a reasonable doubt, that the defendant's prior conduct, or conduct in the commission of the

murder at hand, exhibits a propensity to commit murder which will probably constitute a continuing threat to society. The State argues that the defendant's involvement in the killing of Scott Currier followed by the murder of Miss Palmer shows a propensity to commit murder. While there is no doubt that the defendant was present in the same house when Currier was killed, there is no evidence to support any finding that the defendant was actually involved in his death, however.

The State also argues that the fact that the evidence shows that the defendant kept Palmer from leaving the residence after the killing of Currier exhibits a propensity to commit murder. The only evidence of that comes from the defendant's testimony and version of how and when Kimberly Palmer was killed. The obvious problem with finding such testimony to be factual is that it clearly would also require the court to find that Kimberly Palmer was killed in the State of Washington and would be contrary to the verdict of the jury in this case. This court cannot find, beyond a reasonable doubt, that the defendant kept Kimberly Palmer from leaving the residence in the State of Washington.

It is further argued by the State that the killing of Kimberly Palmer "for such a small reason" by the defendant and others in and of itself exhibits a propensity to commit murder. The court does not agree that the reason was small. The evidence shows that Kimberly Palmer had only minimal contact with the defendant or his associates prior to the continuing series of events which immediately preceeded her murder. She did not provoke any quarrel, fight, or any other altercation but became involved only because she was with Scott Currier. The sole and only motive for her murder which was argued at trial, or for that matter has been suggested by anyone at any time, was to

eliminate forever the possibility that she would reveal the circumstances concerning the killing of Scott Currier to police authorities or to persons who would make such revelations to the authorities.

It seems to the court that this argument would be better made by the State in support of its contention that the evidence supports a finding of an aggravating circumstance under Idaho Code Section 19-2515(f) (6) rather than Section 19-2515(f)(8). While it can be argued that the exhibition of utter disregard for human life in and of itself reveals a propensity to commit murder, it cannot be presumed that the legislature intended to duplicate subsection (6) by its enactment of subsection (8). State v. Osborn, Idaho Supreme Court Opinion No. 13400, filed July 9, 1981. It is this court's opinion that I. C. 19-2515(f)(8) is directed toward the situation where the defendant's prior record and/or the circumstances surrounding the commission of the murder exhibit a strong likelihood or even a probability that the defendant will again commit murder, regardless of the circumstances. The facts of this case, as revealed by the evidence, do not permit a finding, beyond a reasonable doubt, that the defendant has a propensity to commit murder within the meaning of I. C. 19-2515(f)(8).

With respect to Idaho Code Section 19-2515(f)(6), the State argues that the evidence as revealed during the trial proves, beyond a reasonable doubt, that the defendant exhibited utter disregard for human life. It is argued that such is shown by the murder itself and by the circumstances surrounding its commission. The State points to the holding of State v. Osburn, supra, to the effect that, "the phrase, 'utter disregard' . . . is meant to be reflective of acts or circumstances

surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer."

In view of the plaintiff's arguments, and based upon the evidence adduced at the trial, the court makes the following findings of fact concerning the circumstances surrounding the commission of the murder; it is found, beyond a reasonable doubt, that:

a. On June 21, 1980, Kimberly Ann Palmer was a female human being, weighing approximately 100 pounds and being approximately 5'4" in height.

b. Prior to June 21, 1980, Kimberly Ann Palmer was only slightly acquainted with the defendant, having only met him once or twice before during the preceding few weeks.

c. That, shortly after 12:45 o'clock a.m. on June 21, 1980, Kimberly Ann Palmer accompanied one Scott Currier to a certain residence located at South 24 Dearborn Street in Spokane, Washington, which residence was then being rented by one Donald Paradis.

d. That, present at said residence at the time stated were the defendant, Donald Paradis, Charles Amacher, Larry Evans and two females, one of whom is now the wife of the defendant.

e. That an altercation then and there ensued between Currier, on one side, and Paradis, Amacher and Evans on the other.

f. That, as the result of such altercation, Currier was brutally beaten, receiving massive head injuries from which he died at said residence during the early morning hours of June 21, 1980.

g. That, following the death of Currier, and at some time between 12:45 o'clock a.m. and 6:45 o'clock a.m. on June 21,

1980, Currier's body was put into a sleeping bag which, in turn, was placed into Currier's Volkswagen van which had been parked outside the residence.

h. That the defendant, Paradis and Evans then proceeded to drive said vehicle to a location on Mileck Road, south of the City of Post Falls in Kootenai County, Idaho.

i. That the character of such location is wooded and isolated from any nearby dwelling houses or other inhabited structures.

j. That Kimberly Ann Palmer was also transported in such vehicle to such location at the same time, and was alive at the time.

k. That, after reaching said location, the body of Currier was removed from the vehicle and,while still inside the sleeping bag, was drug into the bushes and undergrowth a short distance off Mileck Road.

l. That, at approximately the same time that Currier's body was being disposed of, Kimberly Ann Palmer was killed at a location approximately 90 feet off Mileck Road, which location was across an old barbwire fence from the road and near a small stream.

m. That during the early morning hours of June 21, 1980, Kimberly Ann Palmer was killed by means of manual strangulation and her body was left face down in said stream.

n. That either the defendant, Donald Paradis or Larry Evans actually killed Kimberly Ann Palmer.

o. That the defendant either directly committed the act constituting the premeditated murder of Kimberly Ann Palmer or aided and abetted in its commission.

p. That Kimberly Ann Palmer did nothing to provoke acts resulting in her death.

q. That the reason and motive for the killing of Kimberly Ann Palmer was to permanently insure that she would not reveal to anyone the circumstances resulting in the death of Scott Currier.

The gist of the State's argument, based upon the foregoing factual circumstances, is that the killing of Kimberly Ann Palmer was done in a manner which exhibits that the defendant, as well as his accomplices, were cold blooded and pitiless in accomplishing the murder. Thus, the State argues that this is a case in which the victim had nothing whatsoever to do with the defendant, did not provoke or do anything to incite the acts leading to her killing, and was, in effect, simply an innocent bystander who happened to be in the wrong place at the wrong time. In addition, the State points to the fact that the defendant, and his accomplices, had ample time to reflect upon the situation, but nevertheless elected to take the life of Kimberly Ann Palmer for the sole reason of protecting themselves against the possibility of her revealing to others the circumstances leading to the death of Scott Currier.

The primary arguments raised by the defendant in opposition to any finding that the killing was accomplished in a manner exhibiting an utter disregard for human life are, first, that the defendant is not guilty,i.e., that he did not kill Kimberly Ann Palmer, and, second, that there is no evidence that the defendant actually killed Miss Palmer.

The problem with the first of these arguments is that the jury found to the contrary. The second argument is essentially an argument that, even though the defendant has been convicted as a principal in the murder, in order to sentence him to death for such crime, there must be evidence that he actually was the one who directly committed the manual strangulation of Kimberly Ann Palmer.

9. Statutory Aggravating Circumstances Found Under Section 19-2515(f). It is the finding of the court that the evidence adduced at trial, and relied upon by the State during the aggravation-mitigation hearing, shows, beyond a reasonable double, that by the murder, and the circumstances surrounding its commission, the defendant exhibited utter disregard for human life within the meaning of Idaho Code Section 19-2515(f)(6).

The facts found hereinabove leave no doubt that the killing of Kimberly Ann Palmer was an unprovoked killing of a defenseless human being accomplished in a coldly premeditated fashion for the sole reason of insuring her silence concerning the death of Scott Currier. If the phrase, "utter disregard for human life" means "cold blooded" and"pitiless", then it is difficult to conjure up a situation in which the taking of a human life could be greatly more "cold blooded" or "pitiless". The court believes that the term, "cold blooded" means that, after having considerable time to reflect upon the situation and consider available options, the perpetrator cooly and deliberately decides to take a human life. That is the situation presented in this case. The term, "pitiless" adds little, if anything.

Even though, as has been mentioned, the State has withdrawn its contention that the circumstances show the existence of a statutory aggravating circumstance under Idaho Code Section 19-2515 (f)(10), the applicability of that subsection to the case at hand has not been lost. Subsection (10) provides that it is a statutory aggravating circumstance if the murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding (emphasis added). The State recognized that it could not prove the existence of such an aggravating circumstance, but only because it was obvious that there was no criminal or civil proceeding commenced

at the time of the acts involved, and, therefore, it could not be shown that the murder was committed against a witness or potential witness because of such proceeding.

However, there is little question that the legislative intent in enacting I. C. 19-2515(f)(10) was aimed at essentially the same societal objectives as are presented by the factual situation in this case. Thus, a murder committed to prevent one from becoming a witness in a future criminal proceeding, or for the purpose of eliminating the possibility of such a proceeding, or simply to prevent a person from reporting a crime to the police, differs from a murder committed because of a pending proceeding only by reason of the stage at which the processes of the criminal justice system have moved the matter. It is doubtful that the victim or a potential victim would deem that to be significant, and the essential motive in the mind of the perpetrator is the same. And, while the legislature, in enacting subsection (10) cannot be presumed to have simply repeated subsection (6) of I. C. 19-2515(f), it is clear that there is a relationship among all of the subsections and an inescapable overlapping.

Thus, the killing of a witness, or potential witness, exhibits the same type of cool, calculated, deliberate, and unprovoked taking of a human life as would be necessary to sustain a finding under I. C. 19-2515(f)(6), and, while there was no pending civil or criminal proceeding yet involved at the time of the murder of Kimberly Ann Palmer, it is the finding of this Court that the motive for the killing of Kimberly Ann Palmer in and of itself is substantial evidence that the commission of her murder was accomplished for reasons, and under circumstances which exhibit an utter disregard for human life pursuant to I. C. 19-2515(f)(6).

With respect to the defendant's argument that the evidence must show that the defendant directly committed the offense charged, there is no doubt that no such finding can be made. It can be found beyond a reasonable doubt, and the jury did so find, that the defendant either directly committed the act or aided and abetted in its commission. The court has been provided with no authority which holds that the general law applicable to persons convicted as a principal for a criminal offense (Idaho Code Section 18-204) is altered in any manner because the potential penalty involved is death. Thus, it requires no citation of authority to state that the law in Idaho has long been that a person who aids and abets in the commission of a crime is equally guilty as one who directly commits the act; and, of course, is subject to receiving the maximum punishment allowed by law. The crime of Murder In The First Degree can be punished by death. Idaho Code Section 18-4004. Neither that section of the code nor the sentencing provisions of I. C. 19-2515 provides for any different penalty in the event the conviction was had upon the basis that the defendant only aided and abetted in the commission of the crime.

It must, therefore, be concluded that the legislature intended that a person who aided and abetted in the commission of the crime of Murder In The First Degree could be sentenced to death providing that the circumstances were such that the imposition of the death penalty was warranted pursuant to the provisions of Idaho Code Section 19-2515.

Undoubtedly, not every case involving a person convicted of the crime of Murder In The First Degree for aiding and abetting in a killing would involve circumstances which would justify the finding of an aggravating circumstance pursuant to Idaho Code Section 19-2515(f). It is apparent in this case, however, that,

should the other two individuals who were involved be convicted of the same crime, they could make exactly the same claim as the defendant is making in this case. Thus, even though the murder, or the circumstances surrounding its commission, would warrant the finding of a statutory aggravating circumstance, the mere fact that there was more than one perpetrator would prevent such a finding in many cases if the defendant's argument is valid.

It is not difficult to imagine analogous situations. Assume that three individuals are convicted of Murder In The First Degree for the killing of an executive officer because of the exercise of his official duty. One is convicted solely as a principal because he planned and encouraged the assassination. The other two both fired bullets into the body of the victim, but only one bullet was fatal and there is no evidence which would permit a determination as to which person fired the fatal shot. Obviously, the murder would justify the finding of a statutory aggravating circumstance under I. C. 19-2515(f)(9). However, if, as defendant here argues, such a finding can only be made as against the person who directly accomplished the act of killing, no such finding could be had as against any of those involved, regardless of the degree of culpability.

With respect to the culpability of the defendant in this case, the court is aware that he continues to deny that he killed Kimberly Ann Palmer. The defendant's own version of the killing shows clearly that his actions directly produced the situation which lead the to strangulation of Miss Palmer. Ignoring the jurisdictional aspects of the testimony, it is still revealing to examine the defendant's version of the events.

The defendant has admitted that he struck Miss Palmer with sufficient force to render her unconscious. He has admitted

that this act was done for the sole purpose of preventing her escape and probable revelation of the events leading to the killing of Scott Currier. Question - why did the defendant believe it necessary to use such force for such purpose? The defendant has admitted that he then dragged the unconscious Miss Palmer into the kitchen. Question - why did he drag her into another room? The defendant has admitted that he then felt for her pulse and ascertained that she was still alive. Question - Why did the defendant believe that it was necessary to determine whether or not Miss Palmer was still alive? The defendant states that he then turned to Larry Evans, who was in the kitchen, and advised him that Miss Palmer was still alive. Question - Why did the defendant believe it was necessary to so advise Mr. Evans? Was it just a spontaneous remark or was it, in effect, a statement to Evans that something further would have to be done? The defendant then states that Larry Evans proceeded to strangle the unconscious Miss Palmer, but the defendant admits that he did nothing to attempt to prevent the final act which produced death. Question - Why did the defendant not at least attempt to prevent the strangulation? In that regard, one also wonders what the defendant would have done had Evans not delivered the coup de grace.

At the least, the defendant's own version of the events show that he aided and abetted in the killing of Kimberly Ann Palmer in a very direct manner. Admittedly, and as stated, any determinations made via an examination of the defendant's testimony must ignore the jurisdictional aspect of the situation. But, as before stated, the jury might well have concluded that the events occurred just about as the defendant had related them except that they occurred in Idaho and not in Washington. The evidence relating to the site where the bodies were found coupled

with the testimony of Dr. Brady certainly would sustain such a conclusion. In any event, the defendant's testimony contradicts his statement that he is not guilty.

It is the finding of the court that by his action, by the murder, and by the circumstances surrounding its commission, the defendant himself exhibited utter disregard for human life.

10. Reasons Why Death Penalty Was Imposed. As is set forth hereinabove, the court has found one (1) statutory aggravating circumstance to exist. Idaho Code Section 19-2515(b) provides that, "Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

The court has found one mitigating circumstance, to-wit: the fact that the defendant has no substantial prior criminal record. However, the court does not find that such mitigating factor outweighs the gravity of the aggravating circumstance found. Mitigating circumstances has been defined as "such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability", State v Osborn, supra. It is the finding of the court that the fact that the defendant has no significant history of criminal activity does not outweigh the fact that by the murder committed, and the circumstances surrounding the commission, the defendant has exhibited an utter disregard for human life as has also been found by the court.

The murder committed in this case was not what might be called a "commonplace" murder, or what has sometimes been described as a "normal" murder (if there can be such a thing).

It did not involve family members or persons who were previously closely associated as do the majority of murders. It was committed without even a hint that it resulted from any emotional upheaval as is often the situation. There is no evidence that the use or abuse of alcohol or any controlled substance contributed to the murder as is usually the situation in the so-called "common" murder. As has been found, it was a murder committed in a cool, deliberate manner for a specific purpose, i.e., to cover up a prior killing.

It is the opinion and finding of this court, after much considered thought and soul-searching, that the imposition of the death penalty in this case would not be unjust, and that the imposition of any other penalty would seriously deprecate the seriousness of the crime committed.

CONCLUSION

That the death penalty should be imposed on the defendant for the capital offense of which he was convicted.

The court having made the above findings in accordance with Idaho Code Section 19-2515 and Rule 33.1 of the Idaho Criminal Rules, now therefore,

IT IS HEREBY ORDERED that the above-named defendant appear before the court at 3:00 o'clock p.m. on Thursday, November 5, 1981, for pronouncement of Judgment and Sentence herein.

ENTERED this 2nd day of November, 1981.

Gary M. Haman, District Judge

Copies to:

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ATTORNEY FOR PETITIONER

A. 83-6611

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THOMAS HENRY GIBSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON PETITION FOR CERTIORARI IN FORMA PAUPERIS

I, THOMAS HENRY GIBSON, being first duly sworn, deposes and says that I am the petitioner in the above-entitled case; that in support of my motion to proceed on Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on certiorari are the following:

1. The death sentence imposed by the State of Idaho was done in violation of the United States Constitution.

2. The evidence used at my trial, to obtain a conviction, was introduced in violation of the double jeopardy clause of the United States Constitution.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the Petition for Certiorari are true.

1. Are you presently employed? No. I have been incarcerated continuously since June 26, 1980 in the states of California, Washington and Idaho.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. My wife, Cindy Gibson and my minor daughter. Due to my incarceration, I have been unable to provide any support since June 26, 1980.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Thomas H Gibson
THOMAS HENRY GIBSON

SUBSCRIBED and SWORN to before me this 23 day of March, 1984.

Michael Vrable
Notary Public for Idaho
Residing at Coeur d'Alene

Let the applicant proceed with prepayment of costs or fees or the necessity of giving security therefor.

Justice

AFFIDAVIT...

1983 OPINION NO. 189

IN THE SUPREME COURT OF THE STATE OF IDAHO
No. 14425

STATE OF IDAHO,	)	
Plaintiff-Respondent,	)	Boise, September 1983 Term
v.	)	Filed: December 15, 1983
THOMAS HENRY GIBSON,	)	Frederick C. Lyon, Clerk
Defendant-Appellant.	)	

Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Honorable Gary Haman, District Judge.

Appeal from sentence of death imposed on conviction of first degree murder. Judgment of conviction and sentence affirmed.

Michael J. Vrable, Coeur d'Alene, for appellant.

Honorable Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General, and Larry K. Harvey, Chief Deputy Attorney General, State of Idaho, Boise, for respondent.

SHEPARD, J.

This is an appeal from a conviction of first degree murder and from the sentence of death imposed upon that conviction, together with our review of the death sentence pursuant to I.C. § 19-2827. We affirm.

The circumstances surrounding the crime are largely without challenge except as to the location of and who did the actual killing. Some of the most damaging testimony came from the defendant Gibson himself who testified at trial. Gibson was charged with the first degree murder of Kimberly Ann Palmer. Palmer and a friend, Scott Currier, were in Spokane, Washington, where Currier had met members of a motorcycle group. On June 19, 1980, Palmer and Currier left for a camping trip in a blue and white van. On Friday, June 20, Currier and Palmer checked into a Spokane motel which was located a

short distance from the residence of Donald Paradis; they immediately checked out of the motel, with Currier stating that his guns had been stolen, that he knew who did it, and that he was going to retrieve them.

Gibson testified that in the early morning hours of June 21, he, Paradis, and Larry Evans, among others, were at the Paradis residence when Currier and Palmer arrived. A fight erupted and Gibson testified that he watched Paradis beat Currier to death with a baseball bat. Gibson testified that he left for a short time, and upon returning found Currier lying on the floor dead or dying. Gibson testified that he saw Kimberly Palmer running out of the house and "as she ran by me I grabbed her, pulled her down to the floor and hit her and knocked her out" because he was afraid she would be calling for help. Gibson testified that he then moved Palmer to the kitchen, put her on the floor, took her pulse, determined that she was still alive, and related that to Larry Evans and that Evans then choked Palmer to death. Gibson testified that he watched the choking and thereafter determined that Palmer was dead.

Gibson testified that he and another then placed Currier's body in a blue sleeping bag while Paradis and Evans placed the Palmer body in a red sleeping bag. The bodies were then placed in the blue and white van, which was driven to a remote area just outside of Post Falls, Idaho. Other testimony indicated that at approximately 6:30 a.m. that Saturday morning, the blue and white van was observed driving up a steep mountain road in a sparsely populated area south of Post Falls, Idaho. Two or three men were in that van, one of whom was wearing a distinctive cap. Gibson testified that the blue and white van stalled going up a hill, rolled backwards and overturned. Gibson stated that he stayed in the van while Paradis moved the body of Kimberly Palmer and Evans moved the body of Scott Currier. The van was then pushed over, abandoned, and Gibson, Paradis and Evans walked back to Post Falls. Gibson stated that he was carrying a rifle rolled up in a blue blanket.

Other testimony placed three men of the general description of Gibson, Paradis and Evans walking down that road toward Post Falls, Idaho that same morning. The men were all strange to the area and one was carrying a rolled up blue blanket. Three men of the same description were observed entering Post Falls that morning, and they were questioned by the police in Post Falls. One of those men was identified as Gibson and he was carrying a rolled up blue blanket. Another of the three was identified as Paradis.

Later that day, the blue and white van was seen turned on its side with debris scattered about just off that mountain road. Upon investigation, the body of Kimberly Palmer was found face down in a small stream nearby and the body of Scott Currier was found inside a sleeping bag. Currier's body was bound with pieces of terrycloth and had been bleeding. A distinctive belt buckle worn by Currier had been cut off. Palmer was found to have been strangled to death.

In the early morning hours of Sunday, June 22, the Paradis residence in Spokane was severely damaged by a fire caused by arson. In the basement of that house was found a rolled up rug, in which were found Currier's missing belt buckle, a lawn dart with traces of blood which matched puncture wounds in Currier's back, and a piece of blue terrycloth which matched the terrycloth found with the body of Currier.

On Monday, June 23, Gibson and a friend left the area; they were apprehended in northern California on June 25. Gibson gave a false statement to California authorities before being returned to the State of Washington where he was charged with the murder of Scott Currier. Following trial, he was acquitted of that charge and extradited to Idaho for the murder of Kimberly Palmer.

At trial, a major issue was raised concerning Idaho's jurisdiction over Gibson and, therefore, much of the State's case consisted of autopsy evidence which showed that the varying state of body decomposition indicated that Currier had been killed some hours before Palmer, and water in Palmer's lungs indicated that Palmer had

actually been killed in the streambed in Idaho. That evidence, of course, contradicted of the testimony of Gibson that Palmer had been killed in the Paradis' residence in the State of Washington.

Gibson asserts that at the preliminary hearing stage the information should have been dismissed for lack of probable cause, citing I.C.R. 5.1(c):

> "If from the evidence the magistrate does not determine that a public offense has been committed or that there is not probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall dismiss the complaint and discharge the defendant."

The standard of review for probable cause findings at the preliminary hearing stage was stated in State v. Owens, 101 Idaho 632, at 636, 619 P.2d 787, at 791 (1979):

> "At the preliminary hearing the state is not required to prove the accused's guilt beyond a reasonable doubt; it need only prove that a crime was committed and that there is probable cause to believe the accused committed it. [Citations]. The decision of a magistrate that there exists probable cause to bind a defendant over to district court for trial on the charges should be overturned only on a showing that the committing magistrate abused his discretion."

It is also stated that probable cause exists when the court has before it "such evidence as would lead a reasonable person to believe the accused party has probably or likely committed the offense charged." Carey v. State, 91 Idaho 706, at 709, 429 P.2d 836, at 839 (1967); Martinez v. State, 90 Idaho 229, at 232, 409 P.2d 426, at 427 (1965).

Without reciting the testimony, it is sufficient to state that the evidence produced by the State at the preliminary hearing established that a crime had been committed and a reasonable person would believe that Gibson had probably or likely participated in the commission of the offense charged. We find no abuse of the discretion of the magistrate in his finding of probable cause.

At one point in time, Gibson was represented by the office of public defender for a period of approximately ten days, but during that time no member of that office so much as contacted Gibson. A

member of that public defender's office joined the Kootenai County Prosecutor's Office during the time that it was prosecuting Gibson. That attorney was ordered by the prosecutor's office and by the trial court to speak to no one in the prosecutor's office regarding the Gibson case and that attorney faithfully maintained the silence. Nevertheless, Gibson asserts that the mere appearance of impropriety is sufficient to require reversal. We disagree. Gibson has failed to even allege, much less show, any actual prejudice. Annau v. Schutte, 96 Idaho 704, 535 P.2d 1095 (1975); see State v. Hobbs, 101 Idaho 262, 611 P.2d 1047 (1980); State v. Wolfe, 99 Idaho 382, 582 P.2d 728 (1978); Mahaffey v. State, 87 Idaho 233, 392 P.2d 423 (1964). See also Young v. State, 465 A.2d 1149 (Md. Ct. App. 1983).

Gibson asserts that the trial court should have excluded a statement made by him to a California district attorney since there was no compliance with I.C. § 19-853 in the obtaining of that statement. I.C. § 19-853, in essence, requires that Miranda warnings under certain circumstances be given in writing or otherwise recorded and that the person questioned acknowledge in writing that he has received the Miranda warnings. There is no contention that Gibson did not receive the Miranda warnings or that the actions of the California authorities did not comport with constitutional standards set forth by the United States Supreme Court.

Hence, we restate the issue: should an Idaho court exclude from evidence a statement taken in another jurisdiction admittedly in compliance with the United States constitutional standards but not obtained in compliance with an Idaho statute?

The major purpose behind the exclusionary rule is to assure that police act properly in obtaining evidence from suspects by removing the incentive to do otherwise. Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974); Mapp v. Ohio, 367 U.S. 643 (1961); E. CLEARY, McCORMICK ON EVIDENCE § 166 (2d ed. 1972).

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to

admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." Peltier, supra, at 539; Michigan v. Tucker, 417 U.S. 433, 447 (1974).

It has also been stated that the Court would "simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." Desist v. United States, 394 U.S. 244, 254 n.24 (1969); see also United States v. Calandra, supra; Michigan v. DeFillippo, supra; United States v. Peltier, supra.

In the instant case, the California authorities acted validly within the constraints of the United States Constitution and, insofar as we are informed, followed the laws of their jurisdiction. We find no basis to assume that excluding probative evidence validly obtained by the California authorities in their jurisdiction would deter their future conduct or the conduct of their counterparts in other jurisdictions. Put simply, in a case of this type, there is no rationale whatever for the application of the exclusionary rule and since we deal here with the asserted violation of a state statute rather than a violation of a constitutional right, we refuse to invoke the exclusionary sanction to the statements made to the California authorities.

Gibson next asserts that the trial court erred in admitting evidence connecting Gibson with the death of Scott Currier since it constituted evidence of another crime for which appellant was not on trial. Generally, evidence of other crimes of a defendant is not admissible at trial to show the criminal propensity of the defendant. State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979); State v. Wrenn, 99 Idaho 506, 584 P.2d 1231 (1978). Evidence of other crimes may be introduced, however, if that evidence falls within one of the generally recognized exceptions to the general rule.

"However, this jurisdiction will admit evidence of defendant's past criminal activity to prove: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the

commission of two or more crimes so related to each other that proof of one tends to establish the other, (5) the identity of the person charged with the commission of the crime on trial, and (6) other similar issues." State v. Needs, supra at 892-3, 591 P.2d at 139-40.

In the instant case, the evidence of the Currier death was not presented for the purpose of showing Gibson's criminal propensity, but rather for the purpose of showing motive and common scheme, and to present, as stated by the trial judge, a "rational and cohesive scenario," which uses are permissible. State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975); State v. Dayley, 96 Idaho 527, 531 P.2d 1172 (1975); State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied 401 U.S. 942 (1971).

Gibson argues, nevertheless, that the "other crime" rule differs in this case since the evidence being introduced related to a crime for which Gibson had been acquitted. We disagree. See, e.g., Hernandez v. United States, 370 F.2d 171 (9th Cir. 1966); Buatte v. United States, 350 F.2d 389 (9th Cir. 1965) cert. denied, 385 U.S. 856 (1966); Ladd v. State, 568 P.2d 960 (Alaska 1977) cert. denied, 435 U.S. 928 (1978); People v. Vaughn, 455 P.2d 122 (Cal. 1969); People v. Douglas, 54 Cal.Rptr. 777 (1966); Davis v. State, 277 So.2d 311 (Fla. Ct. App. 1973); Jenkins v. State, 248 S.E.2d 33 (Ga.Ct. App. 1978); State v. Darling, 419 P.2d 836 (Kan. 1966); People v. Bolden, 296 N.W.2d 613 (Mich. Ct. App. 1980); State v. Schlue, 323 A.2d 549 (N.J. Ct. App. 1974); State v. Yormark, 284 A.2d 549 (N.J. 1971); State v. Smith, 532 P.2d 9 (Ore. 1975); State v. Tarman, 621 P.2d 737 (Wash. Ct. App. 1980). See also, Annot., Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 86 A.L.R.2d 1132 (1962).

In the instant case, Gibson has not been charged with the murder of Scott Currier. Hence, we are not required to decide whether Gibson could be charged by a different sovereign, Idaho, for a crime committed in its jurisdiction for which he had previously been acquitted in Washington. Rather, Gibson stands charged with the murder of Kimberly Palmer in Idaho. Hence, the double jeopardy

clause of the Fifth Amendment to the United States Constitution is not specifically applicable to the case at bar. Nevertheless, it is argued that the attendant collateral estoppel rule under Ashe v. Swenson, 397 U.S. 436 (1970), precludes the trial of Gibson since the ultimate issue has already necessarily been determined at a previous trial. We disagree.

In Ashe, the defendant had been charged with robbing one of six people who were engaged in a poker game. He was acquitted of robbing that one participant and acquitted. Thereafter, he was charged and convicted of robbing a second participant. It was held that the acquittal of robbing the first participant necessarily established that he was not the gunman at the holdup and hence could not be convicted for robbing the second participant.

The Ashe rationale is clearly distinguishable from the case at bar. Gibson's acquittal of murdering Scott Currier in the State of Washington does not necessarily establish that he did not participate in the murder of Kimberly Palmer in Idaho. The Washington jury in the Currier trial could have acquitted Gibson on any of a number of defenses, including lack of jurisdiction. On the other hand, the Idaho jury in the Kimberly Palmer trial could well have believed on the evidence submitted that, while someone else killed Currier, Gibson prevented Kimberly Palmer's escape from the scene of the Currier murder, beat her unconscious, transported her into Idaho and there participated in her murder. See King v. Brewer, 577 F.2d 435 (8th Cir. 1978).

Regardless of Gibson's guilt or innocence of Currier's murder, the evidence of that death is highly relevant as a motive for Gibson's participation in the murder of Palmer. Hence, the doctrine of collateral estoppel did not preclude introduction of the evidence of Currier's death during the trial of Gibson for the murder of Palmer.

Gibson next asserts prosecutorial misconduct in the calling of one Colis to the stand during Gibson's trial. We disagree. The State called Colis as a witness, who stated his name and address. He

then was asked if he owned any kind of a vehicle. Before Colis could answer, an attorney representing Colis, introduced himself and stated that he had discussed the matter with Colis. At that point, upon the request of Gibson's attorney, the jury was excused. It was only after the jury left the courtroom that Colis' attorney informed the court that he was instructing Colis to invoke the Fifth Amendment and refuse to answer any questions. Colis affirmed that he was invoking the Fifth Amendment privilege. At that point, the State offered to extend immunity to Colis and offered to obtain a grant of immunity from the State of Washington. The court held that the State could not show Washington had extended immunity to Colis, therefore, Colis was allowed to invoke the Fifth Amendment. Colis was then dismissed and the jury recalled and instructed that they were not to draw or make any inference or draw any conclusion concerning the appearance of Colis.

It is asserted that those facts merit reversal of the conviction of Gibson under a standard set forth in Namet v. United States, 373 U.S. 179 (1963). We disagree. In Namet it was stated that when the prosecution calls a witness knowing that the witness would invoke the Fifth Amendment and refuse to testify, no constitutional question is involved, but merely a claim of evidentiary trial error, and that such claim of error would have to be based either upon a "conscious and flagrant attempt" of the prosecutor to build his case upon inferences arising from that refusal to testify or a showing that "inferences from a witness' refusal to answer added critical weight to the prosecutor's case in a form not subject to cross examination and thus unfairly prejudiced the defendant." At pp. 185-187. Here, neither of the two prongs of Namet are applicable.

Gibson admits the prosecutor made no "conscious and flagrant attempt" to build his case upon impermissible inferences and the record is clear that the appearance of Colis added no "critical weight" to the prosecution's case. See Douglas v. State of Alabama, 380 U.S. 415, 420 (1965); Cota v. Eyman, 453 F.2d 691 (9th Cir. 1971), cert. denied, 406 U.S. 949 (1972). Here, the jury saw Colis

only identify himself. It can hardly be said that testimony or presence added "critical weight" or any weight to the case of the prosecution.

As above indicated, the jury was not present when Colis invoked the Fifth Amendment privilege. See United States v. Edwards, 366 F.2d 853 (2d Cir. 1966), cert. denied, 386 U.S. 908 (1967). We further note that when the jury reentered the courtroom, they were instructed, "You are not to draw or make any inference or draw any conclusion concerning the appearance of Mr. John V. Colis in this courtroom." Hence, even assuming that Gibson was somehow prejudiced by the mere appearance of Colis in the courtroom, it was dissipated by the court's instruction. See Namet v. United States, supra; United States v. Edwards, supra.

Gibson also asserts that the trial court erred in its failure to give the circumstantial evidence instruction approved in State v. Holder, 100 Idaho 129, 594 P.2d 639 (1979). Here the record indicates that the court adequately instructed the jury pursuant to the Holder requirement, albeit at the beginning of the trial. We find no error. We further note that the Holder ruling is required when "the evidence linking the defendant with the [crime] was entirely circumstantial." Holder at 133, 594 P.2d at 643. Here the evidence was far from "entirely circumstantial." We find no error.

Gibson argues that during the closing argument the prosecutor made two improper remarks which require the reversal of the conviction. First, the prosecutor utilized a "link in a chain" argument stating that all of the other links had performed their duties and it was now time for the jury to perform its duty. We find no error. See State v. Larsen, 81 Idaho 90, 99, 337 P.2d 1, 6 (1959); Horn v. State, 376 N.E.2d 512 (Ind. Ct. App. 1978); Fulgham v. State, 386 So.2d 1099 (Miss. 1980); see also Sparks v. State, 275 S.W.2d 494 (Tex. Ct. Cr. App. 1955).

Error is also asserted in the prosecutor making reference to Gibson's silence during his trial for Scott Currier's murder in Washington, i.e., "It's very strange that we have waited until a year

has gone by, that the defendant has already been once in jeopardy in the State of Washington and acquitted, and then now he wants to tell the whole story, that of course he says [both murders] happened over there [in Washington]. Why didn't he say this a year ago?" The general rule governing such remarks is stated in State v. Hodges, __ Idaho ___, ___ P.2d ___ (October 19, 1983):

> "It is clearly erroneous for a prosecutor to introduce evidence of the defendant's postarrest silence for the purpose of raising an inference of guilt. . . . It is likewise erroneous for a prosecutor to comment to the jury on the defendant's failure to testify at trial."

Nevertheless, that general rule is otherwise when the defendant himself takes the stand. As stated by the United States Supreme Court, "[t]he interests of the other party in regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." Jenkins v. Anderson, 447 U.S. 231, 238 (1980); Brown v. United States, 356 U.S. 148, 156 (1958).

In Raffel v. United States, 271 U.S. 494 (1926), which was relied upon and reaffirmed in <u>Jenkins</u>, <u>supra</u>, it was held that once a defendant takes the stand in a second trial, after remaining silent in his first trial, he may be cross examined as to why he remained silent in the prior trial, his waiver of his Fifth Amendment right to remain silent is total, and the permissible scope of cross examination is bounded only by the applicable rules of evidence. <u>Jenkins</u>, <u>supra</u>, reaffirmed that, having waived his Fifth Amendment right to remain silent by taking the stand, a defendant in a state trial may be impeached by his silence, in accordance with that state's applicable rules of evidence. Under the standards set by <u>Raffel</u> and <u>Jenkins</u>, it is permissible to impeach a defendant regarding his earlier silence if the defendant takes the stand. However, we need not base our decision upon <u>Raffel</u> and <u>Jenkins</u> here Gibson not only took the stand, but commented upon his earlier silence. The rule under these circumstances has been stated:

"The rule would seem to be well settled that where a defendant in a criminal trial voluntarily takes the witness stand in his own behalf he is subject to the same rules applicable to other witnesses and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith." State v. Larsen, 81 Idaho 90, 99, 337 P.2d 1, 5, 6 (1959); State v. Hargraves, 62 Idaho 8, 19, 107 P.2d 854, 858 (1940).

Once Gibson himself commented upon his earlier silence, he was subject to prosecutorial cross-examination and comment upon that testimony. See Lockett v. Ohio, 438 U.S. 586 (1978); Bontemp v. Fenton, 692 F.2d 954 (3d Cir. 1982), cert. denied, 103 S.Ct. 1506 (1983).

Gibson next asserts that the imposition of the sentence of death is unconstitutional since here it was imposed by a judge rather than a jury. Our late cases of State v. Sivak, ____ Idaho ____, ____ P.2d ____ (1983), and State v. Creech, 105 Idaho 670 P.2d 463 (1983), are dispositive of this question.

Gibson next asserts that the trial court in its sentencing procedure failed to comply with I.C. § 19-2515, and that those failures of the trial court mandate resentencing. We disagree. Gibson asserts that the trial court improperly weighed the mitigating and aggravating circumstances in that the court grouped mitigating circumstances into categories, i.e., lack of previous felony convictions," "age," "military record,"etc., and determined within each category whether there were sufficient circumstances to mitigate the actions of Gibson. That assertion misstates the facts. Gibson filed with the court a "pre sentencing statement" in which he listed eight items which he contended should be considered as mitigating: 1)a) "Lack of previous felony convictions; b) Age - 30; c) Military Record; and d) Family background. 2) Defendant's trial testimony; 3) Polygraph Examination; 4) Testimony of C. Gordon Edgren, M.D., FAPA; 5) Testimony of Cal Henderson."

Each of those factors set forth by the defendant were examined by the trial court and the court discussed why each, in turn, should or should not be considered mitigating. The trial court then also

considered factors not listed by the defendant which could possibly be considered as mitigating. After considering each of those possible mitigating circumstances, the trial court determined, in its findings

> "in considering death penalty under section 19-2515, Idaho Code, the court has found one mitigating circumstance, to-wit: the fact that the defendant has no substantial prior criminal record. However, the court does not find that such mitigating factor outweighs the gravity of the aggravating circumstance found."

The trial court properly enumerated and considered mitigating circumstances as required by I.C. § 19-2515, and State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981).

Gibson next asserts that the trial court erroneously, under I.C. § 19-2515, improperly held his silence against him in considering whether Gibson's cooperation with police should be considered as mitigating. Again, that assertion misstates the actions of the trial court. The court merely found that there was nothing mitigating in the way Gibson dealt with the police since he found there was no evidence that Gibson had cooperated with the police. There was no showing that Gibson's silence in the Currier murder trial was held against him in the sentencing process.

Gibson next asserts that the trial court erroneously found that Gibson "aided and abetted in the killing of Kimberly Ann Palmer in a very direct manner." Although Gibson argues that the evidence does not support the finding, we disagree. Gibson's own testimony clearly established that he very directly aided and abetted in the murder of Palmer. As noted previously, the jury was free to accept any part of Gibson's testimony as true and any part of it as false. Lono v. State, 629 P.2d 630 (Hawaii 1981); Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), cert. denied, 455 U.S. 922 (1982). The jury could, and apparently did, believe that Gibson beat Palmer unconscious and participated in her transportation to the scene of the murder in Idaho where she was strangled to prevent her from

telling of the murder of Scott Currier. Whichever version of the evidence the jury chose to believe, it is clearly established therein that Gibson intended that Kimberly Palmer die.

Gibson next asserts that persons who are mere aiders and abettors in a killing may not suffer the death penalty. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982), clearly indicates that the death penalty is not an unduly severe punishment for an aider and abettor to a murder when that person intends that a killing take place. As above noted, there can be no doubt from the evidence that Gibson intended that Kimberly Palmer be killed in order to conceal the circumstances of the death of Scott Currier.

I.C. § 19-2827 requires that we now conduct an independent review of this cause and examine the total proceedings in the trial court to ensure that the sentence of death was imposed without resort to passion or prejudice or any other arbitrary factor, that the evidence supports the trial court's findings of aggravating circumstances, and that the sentence of death is not excessive or disproportionate.

We find that all of the procedures mandated in potential death penalty cases were followed. Gibson was in attendance at the pronouncement of sentence and written findings of the trial judge on aggravating and mitigating circumstances were made. Gibson was given notice that the State intended to ask for the death penalty and was given notice of the State's intent to rely on the aggravating circumstances set forth in I.C. § 19-2515(f)(6) - (8), and (10). Gibson was allowed to submit a document to the court setting forth what Gibson felt were the mitigating circumstances that should be considered, and that document and its contents were considered by the trial court. An aggravation/mitigation hearing was held, evidence was taken, and arguments heard thereon. The trial court issued written findings setting forth the mitigating factors he considered and the aggravating factors he found beyond a reasonable doubt. One mitigating circumstance was found, i.e., the lack of significant previous

criminal convictions, and that circumstance was weighed against the aggravating circumstance and found insufficient to stay the death penalty. We find no error.

I.C. § 19-2827 requires us to conduct a review of the sentence imposed in this case in comparison with the sentences imposed in similar cases to ensure that the sentence in the instant case was not excessive or disproportionate. We recently in State v. Creech, supra, conducted an extensive review of Idaho murder cases. We find that the sentence imposed in the instant case is not disproportionate to the sentence imposed in those cases reviewed in Creech where the death sentence was available as a form of punishment. We also have compared the instant case with our recent death penalty cases in State v. Creech, supra, and State v. Sivak, supra, and find that the sentence imposed in the present case is not disproportionate to the sentences imposed in those cases. We note that the murder committed in the instant case is similar to that committed in State v. Sivak, supra, in that in Sivak the trial court found that one of the reasons the victim was killed was to ensure the silence of the victim and prevent her from identifying the defendant as the perpetrator of the robbery. In the instant case, the trial court identified the motive for killing Kimberly Palmer as insuring her silence about the circumstances surrounding the murder of Scott Currier. We find the death penalty imposed in the instant case to be both proportionate and just.

The judgment of conviction and the sentence of death are affirmed.

DONALDSON, C.J., and BAKES, J., concur.

HUNTLEY, J., concurring specially

I concur in the majority opinion with the caveat and reservation that I remain of the opinion that the Idaho capital sentencing process is unconstitutional in two respects:

(1) It does not provide for utilization of the jury, which violates both the Idaho and United States constitutions; and

(2) The sentencing proceeding, as conducted by the trial courts with the approval of this court, deprives the accused of the right to cross-examine and confront witnesses at the sentencing hearing and permits the admission of the presentence investigation report and other hearsay evidence.

My reasoning in this regard is set forth in detail in my dissenting opinions in State of Idaho v. Creech, ___ Idaho ___, 670 P.2d 463 (1983), and State of Idaho v. Sivak, ___ Idaho ___, ___ P.2d ___ (1983).

BISTLINE, J., dissenting.

I.

Constitutionality of the Sentencing
Under the Idaho Constitution

Not in Creech,[1] not in Sivak,[2] and again not in Gibson, has the State presented any argument and authority to refute the considered and substantiated views of Justice Huntley and myself that a defendant convicted of first degree murder in Idaho is possessed of a right guaranteed by the Idaho Constitution to have a jury determine whether he shall live or die. While it is true that justice Bakes attempted a refutation in his Sivak opinion, it did not meet the documented history which establishes that at the time of the adoption of our Idaho Constitution, and thereafter until the advent of Furman, a jury of a defendant's peers made the awesome decision. The views of Justice Bakes are always entitled to considerable deference, but in this particular area it seems abundantly clear that the Justice simply has declined to have a head-on confrontation with history. At some point in time it behooves the State to address the issue. At the present time it is apparently content to ride on the coattails of the Court's Sivak opinion. As I have said before, the High Court's intervention in the death penalty area of state law, while it may have been needed in some of the southern states, as mentioned just recently in the oral argument of the Attorney General in the Aragon[3] case, was not needed in Idaho, the net result being the legislature's passage of a statutory scheme that did not conform

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1 State v. Creech, 105 Idaho ___, 670 P.2d 463 (1983).

2 State v. Sivak, ___ Idaho ___, ___ P.2d ___ (1983) (1983 Opinion No. 118, released August 15, 1983).

3 State v. Aragon, Supreme Court No. 14771.

to the Constitution. The legislature, of course, can correct the situation and cure this Court's inaction. Meanwhile Justice Huntley and I remain unable to join any opinion of the Court's where a jury has not been the sentencer.

II.

Proportionality

Recent cases from the High Court make it abundantly clear that that Court has decided to abandon the field, and has just about completed its evacuation. The State of Louisiana v. Williams is about to play out its last act in a drama extending ten years. Maggio, Warden v. Williams, ___ U.S. ___, November 7, 1983. With that opinion the High Court erased any requirement of statewide proportionality, which issue of proportionality is about all that remains of the High Court's prestigious opinions of the seventies in death penalty cases. Proportionality may well be discarded altogether in Pulley v. Harris, review granted in 460 U.S. ___, to examine the challenge that "the California Supreme Court in Pulley had wholly failed to compare applicant's case with other cases to determine whether his death sentence was disproportionate to the punishment imposed on others." Maggio v. Williams, ___ U.S. at ___. But, however the High Court's opinion in that case may go,[4] it should little affect the conducting of the business of this Court in the area of proportionality. The Idaho legislature in directing our automatic review of death penalty sentences, I.C. § 19-2827, amongst other provisions, requires that this "court shall determine . . . (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

----

4 The California Supreme Court's opinion is reported at 623 P.2d 240 (1981). It contains no discussion of proportionality in examining the penalty phase.

In Sivak it was appropriate for this Court to compare his sentence with that of Bainbridge, his co-defendant who was by some unexplained mishap accorded a separate trial. (The sentences were death to Sivak, life for Bainbridge--both convicted of first degree murder for killing the same woman.) The Court did not do so, however. In Creech it was in order for the Court to compare his sentence with the recent similar cases of Osborn II[5] and LePage.[6] The Court did not do so. Instead, the Creech Court footnoted a string of citations, some of which were first degree murder convictions, and a good many of which were not. For instance, in State v. Otto, 102 Idaho 250, 629 P.2d 646 (1981), the conviction was of attempted first degree murder. Otto was charged with contracting for a murder, but, mistakenly dealing with a police officer, no murder took place. In State v. Lopez, 100 Idaho 99, 593 P.2d 103, the crime of which defendant was convicted was assault with intent to commit murder, and the sentence was five years. The defendant in State v. Garcia, 102 Idaho 378, 630 P.2d 665 (1981), was convicted only of conspiracy to commit murder. It is difficult to accept that the three justices who comprised the Creech majority made the "extensive and thorough review of Idaho murder cases" which it proclaimed in footnote 2, p. 476 of 670 P.2d, and at p. ___ of 105 Idaho.[7] More important is the question as to whether the Court is following

----

5 State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981).

6 State v. LePage, 102 Idaho 387, 630 P.2d 674 (1981).

7 Basing its holding on this Creech language, the Sivak majority said as to proportionality:

> "Our review of similar cases involving the death penalty, while necessarily limited by the lack of such cases, as noted in State v. Creech, supra, does not reveal the presence of any particular excessiveness or disproportionality in this particular case."

State v. Sivak, ___ Idaho ___, ___ P.2d ___ (1983) (1983 Opinion No. 118, released August 15, 1983).

the mandate of I.C. § 19-2817(3)--which requires the proportionality review to be of the penalties imposed in similar cases. To date, other than the declaration in the Creech footnote, I do not see the Court as demonstrating that it has considered at all those cases where the penalty of life imprisonment was imposed. In Creech, Osborn II, and in Sivak, the dissenting opinions have suggested a considerable number of current first-degree murder cases where the death penalty was not imposed. As has been pointed out, district judges are required to transmit to this Court and to the attorney general copies of their § 19-2515 findings in all first degree murder sentencings whenever the death penalty has been imposed. An obvious shortcoming of the statute, I.C. § 19-2827(a) is the omission to require the transmission of the § 19-2515(d) findings where the death penalty has not been imposed. Any respectable proportionality review has to include findings made in all cases where the sentencing court decides between life and death. Although I have previously brought attention to this shortcoming, and believe that for the most part no one disagrees, the Court has done nothing. Other than for my own attempt at collecting all of such cases, and other than where there have been appeals from first degree murder convictions and imposed life sentences, the Court does not operate with a full deck. The legislature clearly contemplated that the Court would rise to its responsibility, as noted by language to that effect contained in § 19-2827(a). Two recent cases where the sentence was not death have been forcibly brought to the attention of the Court by the State's petition for our review from decisions of the Court of appeals. State v. Kelly Wilson, ___ Idaho ___, ___ P.2d ___ (1983) (Supreme Court No. 14472); State v. David Wilson, ___ Idaho ___, ___ P.2d ___ (1983) (Supreme Court No. 14466). Continuing with my own effort at providing the trial bench and the district courts with at least as much knowledge as have I in regard to proportionality, I have appended the trial judge's § 19-2515 findings in those two cases.

This case is much like that of Bainbridge,[8] which was discussed in Sivak. The sentencing judge here observed in his I.C. § 19-2515 findings that "the jury could have, and likely did, find that the defendant aided and abetted in Palmer's death and, consequently was guilty as a principal pursuant to the provisions of I.C. § 18-402." R., p. 689. The judge

> "found, beyond a reasonable doubt, that:
>
> . . . .
>
> "(n) That either the defendant, Donald Paradise, or Larry Evans actually killed Kimberly Ann Palmer.
>
> (o) That the defendant either directly committed the act constituting the premeditated murder of Kimberly Ann Palmer or aided and abetted in its commission."
>
> R., pp. 695-96.

The sentencing judge reflected upon the defendant's contrary argument:

> "The primary arguments raised by the defendant in opposition to any finding that the killing was accomplished in a manner exhibiting an utter disregard for human life are, first, that the defendant is not guilty, i.e., that he did not kill Kimberly Ann Palmer, and, second, that there is no evidence that the defendant actually killed Miss Palmer.
>
> "The problem with the first of these arguments is that the jury found to the contrary. The second argument is essentially an argument that, even though the defendant has been convicted as a principal in the murder, in order to sentence him to death for such crime, there must be evidence that he actually was the one who directly committed the manual strangulation of Kimberly Ann Palmer."
>
> R., p. 696.

----

8 State v. Bainbridge, Supreme Court No. 14544, scheduled for oral argument January 14, 1984.

Elaboration is unnecessary. Under any reasonable proportionality review of similar cases, and Bainbridge is one, the death penalty imposed on Gibson is extremely questionable. More flagrant murderers were those in Osborn II and LePage, both of whom were unquestionably the actual murderers. Gibson, on the other hand, according to the trial court, may or may not have been the person out of three possibles who attended to the strangling of the victim, or was but an aider and abettor. Thus, the case is seen to bear enough resemblance to Enmund v. Florida, 102 S.Ct. 3368 (1982), to require some comment. Enmund was the driver of the getaway vehicle in a planned robbery during which two principals killed the victims. There was no showing that Enmund intended the killings, only that he was, as here, a participant in the affair leading to the death of the victim. The court resolved the question in Enmund's favor.

> "[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.
>
> . . . .
>
> ". . . The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'"
>
> ___ U.S. at ___, 102 S.Ct. at ____ (emphasis added).

The court held that since Enmund's criminal culpability extended only to the robbery, imposition of the death penalty for Enmund's own culpability was excessive and disproportionate and thus a

violation of the eighth amendment. Whether Gibson was in fact an aider or abettor was also an issue, and one upon which the court below found it necessary to give instructions requested by the prosecutor:

> "YOU ARE INSTRUCTED that to aid and abet means to knowingly assist, facilitate, promote, encourage, counsel, solicit or invite the commission of a crime.
>
> "YOU ARE INSTRUCTED that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, are principals in any crime so committed, and as principals are guilty of any crime so committed."

The majority opinion accurately sets forth damaging testimony which Gibson himself gave, omitting only that Gibson added that he left the room after ascertaining that Palmer was alive, and returned to find "Larry Evans was straddled over her choking her . . . . I saw Kimberly Palmer choked, she turned blue."--and admitted making no attempt to stop him because he was afraid to. Gibson's testimony as to his complicity is extremely damaging, and clearly he was an aider and an abettor, and perhaps solely responsible for the detention of the victim which but for such might have allowed her to escape being murdered.

I do not say that Enmunds requires this Court to automatically set aside the death penalty. But I do say that Enmunds, coupled with the sentencing judge's findings and remarks, do require discussion and consideration. Does the record sustain this Court, an appellate court, in concluding that Gibson intended that a killing take place, Enmunds, supra, where the sentencing court made no such finding? It is readily apparent from the Findings that the district court believed there was no distinction whatever between finding a defendant guilty as an aider and abettor as against executing an aider and abettor:

"The court has been provided with no authority which holds that the general law applicable to persons convicted as a principal for a criminal offense (Idaho Code Section 18-204) is altered in any manner because the potential penalty involved is death. Thus, it requires no citation of authority to state that the law in Idaho has long been that a person who aids and abets in the commission of a crime is equally guilty as one who directly commits the act; and, of course, is subject to receiving the maximum punishment allowed by law. The crime of Murder In The First Degree can be punished by death. Idaho Code Section 18-4004. Neither that section of the code nor the sentencing provisions of I.C. 19-2515 provides for any different penalty in the event the conviction was had upon the basis that the defendant only aided and abetted in the commission of the crime.

"It must, therefore, be concluded that the legislature intended that a person who aided and abetted in the commission of the crime of Murder In The First Degree could be sentenced to death providing that the circumstances were such that the imposition of the death penalty was warranted pursuant to the provisions of Idaho Code Section 19-2515."

R., p. 699.

Enmunds seems to be to the contrary.

APPENDIX "A"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO Plaintiff, v. DAVID ZYNN WILSON, Defendant.	)))))))	FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY, UNDER SECTION 19-515 IDAHO CODE Criminal #C-4906

The above-named defendant having been convicted of the criminal offense of First Degree Murder, a felony, Idaho Code Sections 18-4001/18-4003, which under the law authorizes the imposition of the death penalty; and the Court having Ordered a pre-sentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW THEREFORE the Court hereby makes the following findings:

1. CONVICTION. That the defendant while represented by Court-appointed counsel was found guilty of the offense of First Degree Murder, a felony, Idaho Code Sections 18-4001/18-4003, pursuant to a plea of guilty.

2. PRE-SENTENCE REPORT. That a pre-sentence report was prepared by Order of the Court, and a copy delivered to the defendant or his counsel pursuant to Section 19-2515, Idaho Code, and the Idaho Criminal Rules.

3. SENTENCING HEARING. That a sentencing hearing was held on December 3 and 4, 1981, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the Court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

4. FACTS AND ARGUMENT FOUND IN MITIGATION.

1) Defendant was not the trigger man and was, in fact, outside the building when the killing occurred.

2) No evidence that David had instructed Kelly to kill any of the victims if anything went wrong.

5. FACTS AND ARGUMENT FOUND IN AGGRAVATION.

1) Not able to cope with pressure and may act out against society again.

2) Background includes extensive use of drugs and/or alcohol.

3) Nothing parents of defendant have done in the past has served as a deterrent.

4) Extensive prior criminal record.

5) Capable of manipulation and remorse is questionable.

6) Moral character is undesirable.

7) Dishonorable discharge from service.

8) Uncooperative while on probation and under supervision in the past.

9) Acknowledged he has been a bad example and does not desire to be a good example even for his own family members.

6. STATUTORY AGGRAVATING CIRCUMSTANCES FOUND UNDER SECTION 19-2515(f), IDAHO CODE

1) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

2) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

3) The murder was one defined as murder of the first degree by Section 18-4003, Idaho Code, Subsection (d), and it was accompanied with the specific intent to cause the death of a human being.

7. REASONS WHY DEATH PENALTY WAS NOT IMPOSED. Defendant did not pull the trigger and had left the building when gun was fired; no competent evidence that he advised or suggested that Kelly use the gun if anything went wrong; Prosecution recommendation would increase the costs of appeal and lend weight to the defendant's arguments that the death penalty should not have been imposed.

CONCLUSION

That the death penalty should not be imposed on the defendant for the capital offense of which he was convinced.

Dated this 7th day of December, 1981.

/s/ Edward J. Lodge
District Judge

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO, Plaintiff, v. KELLY BRIAN WILSON, Defendant.	)))))))	FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-515, IDAHO CODE Criminal #C-4906

The above-named defendant having been convicted of the criminal offense of First Degree Murder, a felony, Idaho Code Sections 18-4001/18-4003, which under the law authorizes the imposition of the death penalty; and the Court having Ordered a pre-sentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW THEREFOR the Court hereby makes the following findings:

1. CONVICTION. That the defendant while represented by Court-appointed counsel was found guilty of the offense of First Degree Murder, a felony, Idaho Sections 18-4001/18-4003, pursuant to a plea of guilty.

2. PRE-SENTENCE REPORT. That a pre-sentence report was prepared by Order of the Court, and a copy delivered to the defendant or his counsel pursuant to Section 19-2515, Idaho Code, and the Idaho Criminal Rules.

3. SENTENCING HEARING. That a sentencing hearing was held on December 3 and 4, 1981, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the Court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

4. FACTS AND ARGUMENT FOUND IN MITIGATION.

1) The defendant was 19 years old when the offense was committed.

2) The defendant has no prior record (including no misdemeanors).

3) Defendant comes from a loving family that continues to support Kelly.

4) Defendant expresses remorse and is receptive to punishment.

5) The defendant pled guilty.

6) Prosecuting Attorney recommended against the death penalty..

7) Testimony supports a finding that the crime was out of character for Kelly and would not have happened but for the influence of his older brother and the fact that they had been drinking.

8) The defendant is not likely to commit a similar crime in the future.

5. FACTS AND ARGUMENT FOUND IN AGGRAVATION. The crime fit all the material requirements of First Degree Murder, i.e. -intentional - malicious - deliberate and premeditated - no provocation for the offense.

6. STATUTORY AGGRAVATING CIRCUMSTANCES FOUND UNDER SECTION 19-2512(f), IDAHO CODE.

1) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

2) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

3) The murder was one defined as murder of the first degree by Section 18-4003, Idaho Code, Subsection (d), and it was accompanied with the specific intent to cause the death of a human being.

7. REASONS WHY DEATH PENALTY WAS NOT IMPOSED. The defendant's age and the fact that he did not have any prior record of any kind were persuasive in my decision that the crime was out of character for the defendant, and similar conduct would not likely occur in the future. The defendant was intoxicated and under the influence of his brother. Prosecution recommendation would lend weight to the defendant's arguments on appeal and increase the expense to the county.

CONCLUSION

That the death penalty should not be imposed on the defendant for the capital offense of which he was convicted.

Dated this 7th day of December, 1981.

/s/ Edward J. Lodge
District Judge

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent, v. THOMAS HENRY GIBSON, Defendant-Appellant.	)	NO. 14425 FEB 1 5 1984 REMITTITUR

TO: FIRST JUDICIAL DISTRICT COURT, COUNTY OF KOOTENAI.

The Court having announced its Opinion in this cause December 15, 1983, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required.

DATED this 14th day of February, 1984.

Frederick C. Lyon
Clerk of the Supreme Court
STATE OF IDAHO

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Remittitur entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 2/14/84

FREDERICK C. LYON
Clerk

By: Marilyn Downes Deputy

APPENDIX "C"

IDAHO SUPREME COURT/COURT OF APPEALS

STATE OF IDAHO,	)	
Plaintiff-Respondent,	)	O R D E R
v.	)	NO. 14425
THOMAS HENRY GIBSON,	)	
Defendant-Appellant.	)	

COUNSEL:

The Court has ORDERED that Appellant's PETITION FOR REHEARING filed January 3, 1984, of the Court's Opinion issued December 15, 1983, be, and hereby is, DENIED.

DATED this 14th day of February, 1984.

By Order of the Supreme Court

Frederick C. Lyon

cc: Counsel of Record

Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

APPENDIX "D"

COPY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff/Respondent, vs. THOMAS HENRY GIBSON, Defendant/Appellant.	Supreme Court No. 14425 District Court No. F 29470 DEATH WARRANT UPON REMITTITUR

To: AL MURPHY, Director of Corrections and DARROL GARDNER, Warden, Idaho State Penitentiary:

WHEREAS, the above-named Defendant, THOMAS HENRY GIBSON, was found by a jury of twelve persons to be GUILTY of MURDER IN THE FIRST DEGREE as so stated in their verdict rendered June 30, 1981; and,

WHEREAS, on November 5, 1981, the above-entitled Court did enter its Judgment and Sentence based upon said verdict and upon its Findings of the Court in Considering Death Penalty Under Section 19-2515, Idaho Code, that the Defendant is GUILTY of MURDER IN THE FIRST DEGREE and should be punished by infliction of death in accordance with Idaho Code Section 19-2716; and,

WHEREAS, on November 5, 1981, the Court issued a Death

COPY

Warrant commanding that said punishment be inflicted on December 15, 1981; and,

WHEREAS, thereafter appeal was had to the Idaho Supreme Court from the Judgment of Conviction, resulting in stay of execution pursuant to Idaho Code Section 19-2802; and,

WHEREAS, said appeal has now been decided, with Petition For Rehearing being denied, resulting in affirmance of said conviction and sentence imposed, and Remittitur having been rendered on February 14, 1984, ordering the above-entitled Court to comply with the directive of the opinion upon appeal:

NOW, THEREFORE, YOU ARE HEREBY COMMANDED to continue the custody of the above-named Defendant pursuant to Idaho Code Section 19-2705 pending infliction of penalty; and,

YOU ARE FURTHER COMMANDED, pursuant to Idaho Code Section 19-2716, and the Judgment and Order of this Court, that on April 11, 1984, you shall cause the Defendant to suffer the punishment of death in the manner prescribed by such statute unless the execution of this warrant be stayed according to law; thereafter, return upon this warrant shall be made in accordance with Idaho Code Section 19-2718.

DATED this 16th day of February, 1984.

Gary M. Haman, District Judge

DEATH WARRANT
UPON REMITTITUR: 2

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. THOMAS HENRY GIBSON, Defendant/Appellant.	)	No. 14425

BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai

HONORABLE GARY HAMAN
District Judge

MICHAEL J. VRABLE
307 Elder Building
Coeur d'Alene, ID 83814

DAVID H. LEROY
Attorney General,
State of Idaho
Statehouse
Boise, ID 83720

Attorney for
Defendant/Appellant

Attorney for
Plaintiff/Respondent

EXHIBIT "F"

TABLE OF CONTENTS

STATEMENT OF THE CASE

(i)

This is an appeal from a conviction for first degree murder and an imposition of the death sentence.

(ii)

The Defendant was arrested on June 25, 1980, and tried in the State of Washington for the murder of Scott Currie. He was acquitted of that crime, following a jury trial, on September 22, 1980.

On November 25, 1980, Defendant was arrested, on an Idaho warrant, for the murder of Kimberly Palmer. The trial on that charge was held on June 22-30, 1981. The jury returned a verdict of guilty of murder in the first degree.

The trial court, on November 2, 1981, sentenced the Defendant to death.

(iii)

The evidence at trial showed that the bodies of Scott Currie and Kimberly Palmer were found on June 22, 1980, in a remote area about 2-1/2 miles south of Post Falls, Idaho. Physical evidence found with the two bodies and inside a Spokane, Washington, resident tended to show Scott Currie's death had occurred in Washington.

The Prosecutor's theory, which was supported only by circumstantial evidence, was that Kimberly Palmer was killed in Idaho.

ISSUES PRESENTED ON APPEAL

A-I.

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY IN FAILING TO COMPLY WITH THE REQUIREMENTS OF IDAHO CODE §19-2515

A-II.

DEFENDANT'S DEATH SENTENCE, IMPOSED UNDER IDAHO CODE §19-2515 WITH NO PARTICIPATION BY A JURY IN THAT SENTENCING CHOICE, VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION

B.

EVIDENCE TENDING TO SHOW DEFENDANT'S COMMISSION OF AN UNRELATED CRIME SHOULD NOT HAVE BEEN ADMITTED

C.

THE TRIAL COURT ERRED IN NOT INCLUDING IN ITS INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE DIRECTIONS TO THE JURY THAT, WHEN CIRCUMSTANTIAL EVIDENCE IS SUSCEPTIBLE OF AN INTERPRETATION POINTING TO THE DEFENDANT'S INNOCENCE, THE JURY MUST ADOPT THAT INTERPRETATION

D.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEFENDANT'S STATEMENT, MADE IN CALIFORNIA, IN VIOLATION OF IDAHO CODE §19-2515

E.

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL WHEN A PROSECUTION WITNESS REFUSED TO TESTIFY

F.

THE TRIAL COURT ERRED IN NOT DISQUALIFYING THE KOOTENAI COUNTY PROSECUTOR'S OFFICE BECAUSE OF AN APPEARANCE OF IMPROPRIETY

G.

PROSECUTOR'S IMPROPER CLOSING ARGUMENT DENIED DEFENDANT A FAIR TRIAL

H.

THE TRIAL COURT ERRED IN NOT DISMISSING THE INFORMATION FOR LACK OF PROBABLE CAUSE AT THE PRELIMINARY HEARING

POINTS AND AUTHORITIES

1. Mitigating circumstances are those things that, in fairness and mercy, may be considered as extenuating or reducing a defendant's culpability.

Black's Law Dictionary (5th Ed. 1979)

State v. Osburn, 102 Idaho 187, 631 P.2d 196 (1981)

2. Mitigating circumstances include a defendant's background, his age, upbringing and environment or any other matter appropriate to a determination of the degree of culpability.

State v. Owen, 73 Idaho 394, 403 253 P.2d 203 207-208 (1953)

3. The Fifth Amendment right of a defendant to remain silent applies to sentencing proceedings.

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)

4. Due process applies to sentencing proceedings.

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 393 (1977)

5. Evidence of unrelated criminal acts is not admissible.

State v. Wrenn, 99 Idaho 506, 510, 584 P.2d 1231, 1235 (1978)

5. The requirement that an informati-n specifically state the offense charged so that a defendant can properly prepare his defense is a constitutional right.

U.S. Const. amend. VI

Idaho Const., art. I, §13

State v. Gumm, 99 Idaho 549, 551, 585 P.2d 959, 961 (1978)

6. For the Prosecution to use evidence of a defendant's unrelated criminal acts, for which the defendant has been acquitted, is inconsistent with the notions of a fair trial.

McMichael v. State, 638 P.2d 402 (Nev. 1982)

State v. Perkins, 349 S.2d 161 (Fla. 1977)

State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960)

7. The doctrine of collateral estoppel is embodied within the double jeopardy clause of the United States Constitution.

Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971)

Ash v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d (1970)

8. The double jeopardy clause of the United States Constitution is binding on a state through the Fourteenth Amendment.

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)

9. Collateral estoppel prevents the admission of all evidence of a criminal act of which a defendant has been acquitted.

United States v. Keller, 624 F.2d 1154 (3d Cir. 1980)

United States v. Mock, 604 F.2d 341 (5th Cir. 1979)

United States v. Day, 591 F.2d 861 (D.C. Cir. 1979)

State v. Funkhower, 30 Wash. App. 617, 637 P.2d 974 (1981)

10. A state Supreme Court may interpret the state constitution's double jeopardy clause as according greater protection than that accorded by the double jeopardy clause of the United States Constitution.

People v. Belcher, 113 Cal. Rptr. 1, 520 P.2d 385 (1974)

11. In a criminal prosecution based upon circumstantial evidence, it is error to not include an instruction in circumstantial evidence that says:

> You are not permitted to find the defendant guilty of a crime...based on circumstantial evidence unless proved circumstances are not only consistent with the theory that the defendant is guilty... but cannot be reconciled with any other rational conclusion...
> [I]f the evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt the interpretation which points to the defendant's innocence...

State v. Holder, 100 Idaho 129, 594 P.2d 639 (1979)

State v. Davis, 69 Idaho 290, 206 P.2d 271 (1949)

State v. Curry, ____ Idaho App. ____, 647 P.2d 788 (1982)

12. The Supreme Court will review an issue presented on appeal, even absent objection at trial, if fundamental error is involved.

State v. LePage, 102 Idaho 387, 630 P.2d 674, 677 (1981)

State v. White, 97 Idaho 708, 714, 551 P.2d 1344, 1350 n. 8 (1976)

State v. Cariaga, 95 Idaho 900, 904 523 P.2d 32, 35 (1974)

13. Error that goes to basis of a defendant's rights or to the foundation of the case, or that detracts from a defendant's defense is fundamental error.

Smith v. State, 94 Idaho 469, 475, 491 P.2d 733, 739, n. 13 (1971)

State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942)

14. Failure to give the proper instruction on circumstantial evidence when the prosecution's case consists solely of circumstantial evidence is fundamental error, and conviction should be reversed, even if defendant failed to request the instruction.

State v. Love, 106 Ariz. 215, 474 P.2d 806, 807 (1970)

15. The trial court, on its own, must give all instructions that correctly inform the jury of the nature and elements of the crime and of the essential legal principles applicable to the evidence in the case.

State v. Benson, 95 Idaho 267, 275, 506 P.2d 1340, 1348 (1973)

16. If a person is detained by a law enforcement officer on a charge of a serious crime, the officer shall clearly inform that person of his right to counsel; that information shall be in writing or otherwise recorded; and the officer shall record the detained person's acknowledgement of receipt of that information.

Idaho Code §19-853

17. The constitutional right to assistance of legal counsel applies to extrajudicial interrogation by the police of an accused person.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)

Messiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)

State v. LePage, 102 Idaho 387, 630 P.2d 674, 679 (1981)

18. Suppression is the proper sanction for evidence obtained in violation of a statutory right.

State v. Rauch, 99 Idaho 586, 586 P.2d 671 (1978)

19. Absent evidence of the law of a foreign jurisdiction, that jurisdiction's law will be presumed the same as Idaho's.

Barthel v. Johnston, 92 Idaho 94, 96, 437 P.2d 366, 368 (1968)

Reynolds v. Continental Mortgage Co., 85 Idaho 172, 178, 377 P.2d 134, 137-138 (1962)

20. The violation of the right to legal counsel occurs when a statement of a defendant, taken in absence of counsel, is used in trial against the defendant.

Brulay v. United States, 383 F.2d 345, 349, n. 5 (1967)

21. The calling of a witness who the Prosecutor knows will refuse to testify is reversible error if the inference from the witness' refusal unfairly prejudiced the defendant.

Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963)

22. Once the Prosecutor has benefited from a witness's refusal to testify the burden of showing the defendant was not prejudiced is on the State.

State v. Vega, 85 N.M. 269, 511 P.2d 755 (1973)

23. A Prosecutor's comment on a defendant not testifying at trial or at a previous proceeding is fundamental error.

State v. Haggard, 94 Idaho 249, 251-52, 486 P.2d 260, 262-63 (1974)

Griffith v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)

24. A Prosecutor's use of a defendant's silence to raise an inference of guilt is fundamental error.

State v. White, 97 Idaho 708, 714-15, 551 P.2d 1344, 1350-51 (1976)

25. A Prosecutor's use of arguments calculated to appeal to the jury's passions and prejudices is error.

State v. Griffiths, 101 Idaho 163, 610 P.2d 522 (1980)

State v. Spense, 74 Idaho 173, 258 P.2d 1147 (1953)

State v. Givens, 28 Idaho 253, 152 P. 1054 (1915)

26. The State has the burden of proving that misconduct during closing argument did not contribute to the jury's verdict.

State v. Smoot, 99 Idaho 855, 590 P.2d 1001 (1978)

27. A Prosecutor's comment to the jury suggesting that the Prosecutor and the Judge are on the same team is error.

State v. Woodward, 21 Ariz. App. 133, 516 P.2d 589 (1973)

28. The Prosecutor's Office should be disqualified when an attorney, who represented the defendant, goes to work for the Prosecutor.

People v. Shinkle, 51 N.Y.2d 417, 415 N.E.2d 909 (1980)

State v. Chambers, 86 N.M. 383, 524 P.2d 999 (1974)

State v. Latigue, 108 Ariz. 521, 502 P.2d 1340 (1972)

29. Only if probable or sufficient cause to believe a defendant committed an offense is shown at a preliminary hearing can he be bound over to district court.

Idaho Criminal Rule 5.1

30. For there to be probable or sufficient cause the evidence must be such as to lead a reasonable man to believe the defendant

probably or likely committed the offense.

> Martinez v. State, 90 Idaho 229, 232, 409 P.2d 426, 427 (1965)

31. Unless a defendant is properly bound over in a preliminary hearing, the district court lacks jurisdiction to try him.

> State v. Ruddell, 97 Idaho 436, 439, 546 P.2d 391, 394 (1976)

A-I

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY IN FAILING TO COMPLY WITH THE REQUIREMENTS OF IDAHO CODE SECTION 19-2515

Following the jury's verdict, the trial court made written findings under Idaho Code §19-2515. R. Vol. III, pp. 684-703. In those findings, the court considers eleven possible mitigating factors. Only one factor was found to be mitigating -- the Defendant had "no significant history of criminal activity". R. Vol. III, p. 686.

The trial court then found that the Defendant, in his crime, had "exhibited an utter disregard for human life". R. Vol. III, p. 702. This finding was based, in part, on the Defendant's trial testimony.

In stating its reason for imposing the death penalty, the court said that mitigating factor did not outweigh the gravity of the aggravating circumstances. R. Vol. III, p. 702.

Under Idaho Code §19-2515(d) a trial court is supposed to "set forth in writing any mitigating factors" it considers and to balance them against any "aggravating circumstances". If the mitigating circumstances outweigh the aggravation, "so as to make unjust the imposition of the death penalty" then sentence can not be imposed.

Although at first appearance the court complied with Code Section 19-2515, a closer look at its findings shows

three faults.

(1)

The first fault is that the trial court, by considering mitigating factors grouped under several headings, eliminated genuine mitigating circumstances that should have been balanced against the aggravating circumstances.

For example, even though the trial court stated that Defendant's family was supportive which implies a favorable factor towards rehabilitation, found his "family background" was not a mitigating circumstance. R. Vol. III, pp. 687-88. Even though the Defendant's military record shows his having obtained his G.E.D., earned the rank of E-5, and had been honorly discharged, R. Vol. III, p. 732 (psychiatric evaluation) the Court found it, on the vhole, not mitigating. R. Vol. III, p. 687.

Similarly, Dr. Edgren's psychiatric evaluation suggests Defendant had "significant emotional deprivation during his early childhood". R. Vol. III, p. 733. Nevertheless, the trial court found nothing mitigating in that report. R. Vol. III, pp. 689-690.

It seems clear that the trial court determined the existence of mitigating circumstances by first looking at a set of factors grouped under a particular heading ("family background" e.g.). If the bad outweighed the good within that group, there was nothing mitigating.

against his negative background, thereby eliminating them as mitigating circumstances.

The trial court found only one mitigating circumstance -- lack of any significant criminal record -- to balance against the aggravating circumstances. But other mitigating circumstances clearly existed. Those too should have been balanced against the aggravation before the trial court decided to impose the death penalty.

(2)

The second fault with the trial court's sentencing findings is its use of the Defendant's silence at his Washington trial.

The Defendant testified that, after his arrest in Idaho, he talked to the Spokane police. He told the Spokane police about the killing of Currie and Palmer. T. Vol. V, pp. 975-977.

The trial court apparently felt that cooperating with the police after the trial was not important.

> There is no evidence that the defendant has cooperated with the police. At the time of the trial held in the State of Washington... the defendant considered testifying for the prosecution. Such testimony quite likely would have changed the result of that trial; <u>the defendant elected not to testify</u>.

R. Vol. III, p. 690 (emphasis added).

Cooperating with the Spokane police, the trial court implied, would have meant testifying at trial. The Defendant, of course, had a right not to testify.

The Defendant's exercise of his constitutional right

Using this method the trial court omitted Defendant's supportive family, his military achievements during the Vietnam war, and the psychiatric explanation of Defendant's emotions from the balancing requirement of Code Section 19-2515(d).

Idaho court decisions dealing with mitigation in death sentencing clearly indicate the trial court should have used these omitted circumstances.

In *State v. Osburn*, 102 Idaho 405, 631 P.2d 187 (1981), the Supreme Court quoted Black's Law Dictionary's definition of mitigating circumstances as something not justifying the crime but something

> in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

Id. at 415, 631 P.2d at 197.

Much of what Dr. Edgren states in his report reduces the "degree of culpability" of Defendant's act. Those things should have been balanced against the aggravating circumstances.

In *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), the Court implied a defendant's "background, his age, upbringing and environment" should be used to determine the degree of his culpability. Id. at 403, 253 P.2d at 207-208. The positive background of the Defendant, his supportive family, and his achievements in the Marine Corps -- these should not have been offset

to remain silent was used against him. His election not to testify offset his post-trial cooperation with the police.

It is clear that the Fifth Amendment of the United States Constitution applies to criminal sentencing proceedings. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Use of the Defendant's silence at his Washington trial to offset a mitigating circumstance was wrong.

The Defendant's post-trial cooperation with the Spokane police, however insignificant the trial court felt it was, should have been a mitigating circumstance balanced against the aggravation.

(3)

The third fault in the trial court's sentencing findings is its conclusion that the Defendant "aided and abetted in the kiling of Kimberly Ann Palmer in a <u>very direct manner</u>". R. Vol. III, p. 701 (emphasis added).

The court conceded it could not find, beyond a reasonable doubt, that the Defendant directly committed the murder. R. Vol. III, p. 699. And although it stated the law to be that an aider and abetter is as guilty as the one who directly commits the offense, R. Vol. III, p. 699, the court felt compelled to find the degree of Defendant's aiding and abetting. It felt this way because

> not every case involving a person convicted of the crime...for aiding and abetting... would involve circumstances which would

justify the finding of an aggravating circumstance pursuant to Idaho Code Section 19-2515(f).

R. Vol. III, p. 699.

In determining the degree of the Defendant's aiding and abetting, the court analyzed the Defendant's testimony. R. Vol. III, pp. 700-701. From this analysis the court concluded that the Defendant's aiding and abetting was "very direct".

But the analysis of the Defendant's testimony does not support the conclusion. It begins at the bottom of page 700 of the clerk's record and covers most of page 701. It recounts each step of Defendant's actions, asking rhetorical questions but not answering them. At the end of the analysis the court wonders "what the Defendant would have done had Evans [a co-defendant] not delivered the coup de grace [by strangling the victim]." R. Vol. III, p. 701.

Using this analysis of the Defendant's testimony -- that he, upon finding that his companions had killed Currie, impulsively struck the victim as she tried to flee and dragged her into the kitchen; that he determined she was alive; that immediately another man jumped on top of the victim and strangled her -- the court found the Defendant very directly involved and exhibited utter disregard for human life.

This brief later deals with the constitutional issues of whether a state can put to death a person who only aids and abets in a murder. At this point in the brief, the argument is that the evidence of Defendant's aiding and abetting is insufficinet to find the aggravation of utter disregard of human life.

The trial court's use of rhetorical questions demonstrates its conclusion on the Defendant's involvement was reached solely through speculation. That due process applies to sentencing proceedings is well accepted. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 393 (1977). Due process should include a rational basis for the court's conclusion.

A-II

DEFENDANT'S DEATH SENTENCE, IMPOSED UNDER IDAHO CODE §19-2515 WITH NO PARTICIPATION BY A JURY IN THAT SENTENCING CHOICE, VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

By completely excluding the jury from the capital sentencing process, Idaho has condemned Defendant to die in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. At the hearing Defendant posed proper objection to the statute's constitutionality under Idaho Code §19-2515 (R. Tr. to be augmented) preserving review by this Court.

A. The nearly unanimous requirement of jury sentencing in capital cases among the states establishes that jury involvement in the imposition of death is constitutionally required.

In *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976), the plurality noted that a majority of state legislatures had reinstituted the death penalty after the court's 1972 Furman decision; it called this pattern of legislative activity the "most marked indication of society's endorsement of the death penalty for murder." Id. at 179. Gregg is just one step in a progression of decisions that have relied on prevailing patterns of state legislative policy as a source of values for resolving the question whether a particular form of the death penalty satisfies the Eighth Amendment's concern with "evolving

standards of decency," Id, at 173.[1] It is therefore of profound constitutional significance that Idaho stands with only a tiny minority of American states in wholly barring the jury from capital sentencing.

Of the 34 states with operative death penalty laws enacted since Furman,[2] fully 29 involve the jury to some degree in capital sentencing,[3] and 27 give a capital defendant the right to a binding jury determination that he receive life imprisonment rather than death.[4] That even five state legislatures have completely excluded the jury from capital sentencing does

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1 *Woodson v. North Carolina*, 428 U.S. 280, 291-93 (1976) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 594 (1977); *Beck v. Alabama*, 447 U.S. 625, 635 (1980); see also, *Furman v. Georgia*, 408 U.S. 238, 436-38 (1972) (Powell, J., dissenting); Id., at 385 (Burger, C.J., dissenting).

2 This number excludes Oregon, where the state Supreme Court recently struck down its death penalty law under the state Constitution. The Oregon law had permitted the death sentence where the prosecution could prove at the penalty phase that the defendant had acted with a mental state more blameworthy than that proved at the guilt phase, yet denied the defendant a jury determination of the existence of that mental state. *State v. Quinn*, 50 Or. App. 383, ____, 623 P.2d 630, 639-44 (1981).

3 This number includes two states in which the jury makes a nonbinding recommendation of sentence to the judge. Fla. Stat. Ann. §921.141 (West. Supp. 1980); Ind. Code Ann. §35-50-2-9 (Burns 1980). See note 15, infra. The states that now wholly exclude juries from capital sentencing are Alabama, Arizona, Idaho, Montana and Nebraska. Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 14 & n. 51 (1980).

4 In some states that guarantee a sentencing jury to a capital defendant convicted by a jury, the defendant can waive the sentencing jury by pleading guilty or requesting a bench trial at the guilty phase. Gillers, supra, note 11, at 14 & nn. 53-57 (1980). Of course, for the Defendant in this case, under Idaho law, there was no right to jury sentencing to be waived when he was convicted.

not moreover, reflect a belief in those states that jury sentencing is inappropriate or undesirable.[5] Each of these five states had embraced jury sentencing for decades before Furman, W. Bowers, supra note 4, at 8, and their decisions to enact all-judge capital sentencing schemes shortly after Furman -- including Idaho's decision in adopting Idaho Code §19-2515, amended 1977 -- reflect nothing more than their misperception that Furman's condemnation of unbridled jury sentencing demanded the complete exclusion of the jury from capital sentencing. The legislatiive decision in this state, along with the others, to bar the jury from death sentencing therefore manifest only a misguided attempt "to retain the death penalty in a form consistent with the Constitution." *Woodson v. North Carolina*, supra, 428 U.S., at 298.

B. The Eighth Amendment's principle that death sentences must satisfy evolving standards of decency and the dignity of man requires jury participation in capital sentencing.

In view of the "awesome finality of a capital case," *Kinsella v. Singleton*, 361 U.S. 234, 249 (1960) (Harlan J.,

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[5] Except for four states that entirely abolished capital punishment in the Nineteenth Century, every American jurisdiction has at least at some time authorized jury sentencing in capital cases. *McGautha v. California*, 402 U.S. 183, 200 n. 11 (1971). During a period of over a century beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionary jury sentencing, *Woodson v. North Carolina*, 428 U.S. 280. 291-92 (plurality opinion). See, W. Bowers, Executions in America 8 (1974).

concurring and dissenting), the Supreme Court has repeatedly recognized the crucial role juries play in the determination whether a capital defendant merits the death sentence. *Gregg v. Georgia*, supra, 428 U.S. at 181-82, 190-92; see, *Duncan v. Louisiana*, 391 U.S. 145, 156 (involvement of jury in capital cases reflect a "reluctance to entrust plenary powers over... life [and death]...to one judge or a group of judges."[6] That the Eighth Amendment of the United States Constitution requires at least some jury participation in capital sentencing can best be appreciated by reference to the substantive Eighth Amendment standards the court has invoked in holding that the death penalty is not invariably cruel and unusual punishment.

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[6] Dictum in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion), notes that the court has never expressly stated that the Constitution requires jury sentencing in capital cases. Proffitt, however, approved a capital sentencing scheme very different from Idaho's. In contrast to the complete exclusion of the jury in Idaho, the Florida scheme entitles the defendant to an advisory jury verdict on penalty, Id. at 249-49, 251-53, and the sentencing judge must abide by a jury recommendation of mercy unless "the facts suggesting a death sentence [are]...so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (1975), quoted in *Proffitt v. Florida*, supra, 428 U.S. at 249. Plainly, Proffitt in no way resolved the constitutionality of all-judge capital sentencing; indeed, in two post-Proffitt cases a majority of the Supreme Court has expressly reserved any decision on that issue. *Bell v. Ohio*, 438 U.S. 637, 642 n.* (1978); *Lockett v. Ohio*, supra, 438 U.S. at 609 n. 16.

Basically, the court has explained that a particular punishment is not cruel and unusual if it satisfies two criteria. First, the penalty must accord with contemporary moral and social values by reflecting "the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, supra, 428 U.S. at 173, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Second, the punishment must respect "the dignity of man," by serving legitimate penological goals and by bearing a reasonably proportionate relationship to the crime for which it is imposed. *Gregg v. Georgia*, supra, 428 U.S., at 173. In holding that the penalty of death for murder does not necessarily violate these standards, the Gregg plurality's unmistakable theme was that, under the Eighth Amendment, imposition of the death penalty on a defendant must find validation in the responsible moral and social values of the community that condemns him. An essential medium of those values is the jury.

To support its conclusion that imposition of the death penalty in some circumstances could accord with "evolving standards of decency," the Gregg plurality looked to the two most reliable sources of responsible public attitudes and values: legislatures and juries.[7] Thus, even with respect to the

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[7] The plurality noted that a majority of the state legislatures had reenacted the death penalty after the court's 1972 Furman decision, *Gregg v. Georgia*, 428 U.S. 153, 1979-81 (1976) (plurality opinion), and that since Furman American juries, though imposing the death penalty infrequently, had done so often enough to suggest that they did not categorically disapprove of the penalty. Id, at 181-82.

general question whether the death penalty comports with evolving social and moral standards, the plurality found it necessary to rely on patterns of jury behavior. The plurality's emphasis on evolving standards, Id. at 172-73, suggests that this Eighth Amendment principle is organic, requiring the courts to continually refer to the moral development of American society. The courts cannot rely on legislatures alone as reflectors of responsible community values. Legislators confront capital punishment abstractly. They determine whether a society is willing to have a law permitting capital punishment, not whether the society, through the instrument of the jury, is willing to carry out that law. *Lockett v. Ohio*, 438 U.S. 586, 625 (1978) (White, J., concurring and dissenting).[8] Moreover, a statute is static, and as public values change, it may become a less reliable indicator than a jury. Therefore, unless juries, one of the two essential barometers of social values, play some role in capital sentencing, the courts cannot

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8 The tendency of juries to nullify the legislative intent of some criminal laws indicates that the legislature alone cannot represent the evolution of community sentiment in criminal matters. Examples are abundant. In Nebraska, convictions for felony possession of marijuana became so rare that conservative legislators reduced the maximum penalty to 7 days in jail. Galliher, McCartney, & Baum, Nebraska's Marijuana Law: A Case of Unexpected Legislative Innovation, 8 L. & Soc. Rev. 441, 445-46 (1974). American juries regularly refused to convict for liquor violations during Prohibition, and continue to refuse. H. Kalven & H. Zeisel, The American Jury, 292 n. 10 (1966). A survey of traffic law enforcement studies concludes that increasing the penalties for drunken driving changes jury behavior in such cases so as to minimize or even annual the increase. Ross, The Neutralization of Severe Penalties: Some Traffic Studies,

confidently determine whether capital punishment does indeed continue to comport with responsible public views.[9]

The Eighth Amendment demands more, however, than general social approval of the death penalty as a permissible means of punishment. Because the death penalty is "so profoundly different from all other penalties," *Lockett v. Ohio*, supra, 438 U.S., at 605 (plurality opinion), the Eighth Amendment also demands individualized consideration of the propriety of the death sentence in every capital case. Ibid. Given "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," Ibid., state capital sentencing schemes must ensure that individual death sentences satisfy the moral demands of evolving standards of decency. See *Woodson v. North Carolina*,

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(footnote 8 continued)
10 L. & Soc. Rev. 403, 410 (1976). And as sentiment against the Vietnam War rose from 1968 to 1971, so did jury acquittals in draft-evasion cases. Kritzer, Enforcing the Selective Service Act: Deterrance of Potential Violators, 30 Stan. L. Rev. 1149, 1156 n. 31 (1978).

[9] Indeed, in the last 9 years, eight of the Justices have written or joined opinions that look to the pattern of jury verdicts in support of a conclusion about the constitutionality of the death penalty, either generally, or for particular crimes. *Lockett v. Ohio*, 438 U.S. 586, 624-25 (1978) (White, J. concurring and dissenting), *Coker v. Georgia*, 433 U.S. 534, 596 (1977) (White, J., joined by Stewart, Blackmun, & Stevens JJ.); *Woodson v. North Carolina*, supra, 428 U.S. at 293 (Stewart, Powell & Stevens JJ.); *Gregg v. Georgia*, supra, 428 U.S. at 181 (Stewart, Powell & Stevens, JJ.); *Furman v. Georgia*, supra, 428 U.S. at 181 (Stewart, Powell & Stevens, JJ.); *Furman v. Georgia*, supra, 408 U.S. at 439-40 (Powell, J. dissenting, joined by Burger, C.J., and Blackmun & Rehnquist, JJ.); Id., at 299-300 (Brennan, J.).

428 U.S. 280, 303-305 (1976) (plurality opinion); *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (plurality opinion). Whatever partial role the legislature can play in reflecting responsible public sentiment on the general validity of the death penalty, only a jury can ensure that a particular death sentence meets this Eighth Amendment command. As the Gregg plurality stressed, "'one of the most important functions any jury can perform in making...a selection [between life imprisonment and death for a defendant convicted of a capital case]... is to maintain a link between contemporary community values and the penal system.'" *Gregg v. Georgia*, supra, 428 U.S., at 181 (plurality opinion), quoting *Witherspoon v. Illinois*, supra, 391 U.S. at 519 n. 15; see *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion).

In testing the death penalty against the second substantive Eighth Amendment requirement, the "dignity of man", Gregg stated that one of the two legitimate penological goals justifying execution was retribution. *Gregg v. Georgia*, supra, 428 U.S., at 183. Gregg thereby reinforced the principle that the proper infliction of the death penalty is an essentially communal decision requiring a reflection of responsible communal values.[10]

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[10] The plurality stressed that "capital punishment is an expression of society's moral outrage at particularly offensive conduct," and that "'[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.'" *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion), quoting *Furman v. Georgia*, 408 U.S., at 308 (Stewart, J., concurring).

"indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grevious an affront to humanity that the only adequate response may be the penalty of death." *Gregg v. Georgia*, Id. at 184 (footnote omitted) (emphasis added). Here again, jury involvement in capital sentencing is necessary to ensure as a general matter that the death penalty properly reflects the attitude of society toward a given class of crime. But as the same plurality noted on the same day in *Woodson v. North Carolina*, supra, 428 U.S., at 304, "the fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (emphasis added). Thus, a prevailing social belief in retribution must justify not only the general permissibility of the death penalty but also the infliction of the death sentence in particular cases. In this regard, the jury is indispensable in ensuring that society does indeed seek retribution against the particular defendant: [A] jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, supra,

391 U.S., at 519-20.

C. Judges alone cannot adequately reflect community values in the sentencing process.

The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, supra, 438 U.S., at 604 (plurality opinion) (emphasis added). A death penalty procedure is unconstitutional if it is so unreliable that it "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. at 605. Since the court has held that death sentences must comport with the community's sense of evolving standards of decency and its legitimate desire for moral retribution, an essential question is whether judges alone can reliably reflect the communal values that are the source of the constitutionality of capital punishment.

By definition, juries not judges are "the cross-section of the community," reflecting community values. *Duren v. Missouri*, 439 U.S. 357, 359 (1979). Only a representative jury assures "meaningful community participation." *Ballew v. Georgia*, 435 U.S. 223, 235 (1978) (plurality opinion). Jurors, unlike judges, are selected to enhance the likelihood that they represent the whole range of community beliefs and backgrounds, *Taylor v. Louisiana*, 419 U.S. 522, 531-33 (1975); the difference segments of the community bring to the representative jury "perspectives and values that influence both jury deliberation and result,"

Id., at 532 n. 12. See *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). Moreover, the sheer difference in size between a jury and a 1-judge or 3-judge sentencing panel may bear significantly on the validity of a sentencing decision under the Eighth Amendment. Canvassing expert emperical studies, the Supreme Court has concluded that the likelihood that a decision in a criminal case correctly applies "the common sense of the community to the facts" increases with the number of decisionmakers. *Ballew v. Georgia*, supra, 435 U.S. at 232.[11] Twelve individuals are obviously more likely to reflect the prevailing views of society than one person or three.[12]

A jury needs not engage in questionable speculation to determine what community sentiment would say in a particular case. Its very function is to bespeak that community sentiment by exercising its own judgment. The jury's response is society's response. *Witherspoon v. Illinois*, supra, 391 U.S., at 519-20. By contrast, judges cannot themselves speak for community sentiment. If they are to fulfill the demands of the Eighth Amendment by bringing evolving standards of decency and principles of

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[11] Ballew also amassed considerable empirical evidence to prove that reducing the number of decisionmakers in a criminal case impairs the accuracy, fairness, thoroughness, and consistency of the decision, generally to the detriment of the defendant. *Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978) (plurality opinion).

[12] Significantly, every state authorizing jury involvement in capital sentencing appears to require a jury of twelve persons. Gillers, supra, note 11, at 63 n. 298.

retribution to bear in a capital punishment case, they can only do so indirectly. Unable to represent the community sentiment, a judge must undertake to ascertain it. That is necessarily a difficult task,[13] made even more difficult because judges -- whether considered in terms of race, sex, or economic class -- do not reflect the wide range of backgrounds or beliefs within the community.[14] "[T]he reluctance of juries in many cases to

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[13] Judges may theoretically have access to community sentiment through social contact, as well as through such sources as polls, editorials, journals, and newspaper reports. Cook, Public Opinion and Federal Judicial Policy, 21 Am. J. Pol. Sci. 567, 576 (1977). Unfortunately, these sources greatly overstate the willingness of members of the community to impose the death penalty on specific defendants for specific crimes. Research on jury behavior reveals that jurors are substantially more lenient when trying an actual case and sititng through deliberations than they will otherwise indicate. Zeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 Stan. L. Rev. 491, 511-12 (1978) (shadow juries drawn randomly and not subject to peremptory challenges vote guilty far more often than real juries; probably because the defendant's liberty was not in their hands). People who favor the death penalty in the abstract are more lenient when presented with descriptions of actual cases. Ellsworht & Ross, Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists, ____ Crime & Delinquency ____ (in press).

[14] As of 1979 judges in state courts of general trial jurisdictions earned salaries ranging from $24,400 in Oklahome to $54,205 in California, with a mean of approximately $41,000. Nat'l Center for St. Cts., Survey of Judicial Salaries 1 (Sept. 1979). As of 1977 in these general jurisdiction courts, only 2.5 percent of the 5,155 judges were women, and 20 states had no women at all on these courts. Cook, Women Judges: The End of Tokenism, in Women in the Courts, 84, 87-88 (Nat'l Center for St. Cts. 1978). It appears that as of 1977 only 2.6 percent of the judges on these general trial courts were black. G.W. Crockett, number and Distribution of Black Judges (March 1977) (unpublished charts on file with Nat'l Center for St. Cts.). Finally, the rigorous educational requirements for admission to the bar make it inevitable that the average educational attainment of judges will far exceed that of the community in general.

impose the sentence [of death] may well reflect the humane feeling that this most irrevocable sanction should be reserved for a small number of extreme cases," *Gregg v. Georgia*, supra, 428 U.S., at 182. For a variety of reasons, judges appear less likely to reflect the same reluctance.[15]

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[15] Kalven and Zeisel's classic report shows that judges and juries disagree in a substantial number of cases. In a study of 3576 trials, judge and jury reached the dame decision about a criminal defendant only 72 percent of the time. H. Kalven & H. Zeisel, supra note 21, at 68. In their specific study of the death penalty, the authors report that judge and jury disagreed about the imposition of a death sentence in 19 percent of the cases, Id., at 436. To view the results yet another way, in those cases where one or both recommended death, judge and jury disagreed 60 percent of the time. In those cases in which either the judge or jury or both would have voted for the death penalty, in 40 percent, judge and jury agreed, and in 40 percent only the judge would have voted for the death penalty, yet in only 20 percent of the cases woudl the jury but not the judge vote for execution. Thus, the juries were essentially twice and lenient as the judges. Ibid. As a United Nations Report concludes:

> "[A]mong the leading authorities in penal science the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, penologists, doctors and writers on social science on criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

United Nations, Dept. of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) 64 (1968).

The reason for these differences may lie in the greater reluctance of judges to depart from what they perceive to be the letter of the law. Kalven and Zeisel discovered in more than one judge "a kind of envy of the freedom of the jury to reach a decision which he as a judge could not reach" Kalven & Zeisel, supra, at 428. The judge's role as a strict enforcer even restricts his discretion in sentencing decisions where that discretion

As a means of reliably reflecting community sentiment on capital punishment, bringing lay jurors into the sentencing process "'places the real direction of society in the hands of the governed...and not in...the government.'" Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 5 (1966), quoting De Tocqueville, Democracy in America 282 (Reeve Tran. 1948). Quintessentially, the right to a jury "is granted to criminal defendants in order to prevent oppression by the government,"

(footnote 15 continued)
would seem to be wholly lawful. As one judge said of draft evasion cases: "I am opposed to conscription. I also believe that the war in Vietnam is both immoral and impractical. My sentencing policies are based upon the fact that as long as law exists, it should be imposed to effectuate its intent and purpose." Cook, Sentencing Behavior of Federal Judges: Draft Cases--1972, 42 Cinn. L. Rev. 597, 623 (1973). At the same time, Cook's study also reveals that as judges (unlike) individual jurors) accrue experience in a given type of case, their sentencing settles into distinct and regular patterns of severity or leniency, Id., at 602-03, so that the judge's first decision whether a person lives or dies may inspire far more deliberation and consideration than subsequent decisions. For individual jurors, however, the gravity with which they approach their decisions in capital cases will rarely be affected by such routinization.

Florida studies cited in Gillers, supra, note 11, at 67-68 n. 318, report that sentencing judges were significantly more inclined to impose death than the juries that recommended sentences to them. The studies also show that the judge's decisions seem to correlate with the race, sex, and social background of the defendant and victim, while the juries showed no evidence of any such biases. Ibid. Anothe- study, by Diamond, compared the sentencing patterns and attitudes of lay and professional justices in the British Magistrate's Court, concluding that lay justices are more lenient, report their cases in greater detail and with greater attention to the facts about particulars, seek more information as a basis for their decisions, express less self-confidence in the correctness of their decisions, and, in particular, refer less to "what the public has a right to expect" than do the more self-conscious professional justices. Lawyers and Laymen as Judicial Decision-makers (Paper delivered before the American Psychological Association, Oct. 17, 1981).

Duncan v. Louisiana, 391 U.S. 145, 155 (1968), and to protect against "arbitary" action by the "compliant, biased, or eccentric judge." Id. at 156. It "reflects a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges." Ibid.[16] These concerns are not less appropriate whre life stands immediately in the balance.

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[16] The Proffitt's plurality's speculation that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to imose sentences similar to those imposed in analogous cases." *Proffitt v. Florida,* supra note 15, 428 U.S., at 252, must, of course, be read in the context in which it was made: as a statement of the probable result of the Florida system in which an advisory jury sentence may be mitigated at the discretion of the trial judge, or increased from life imprisonment to death only where a life sentence would be manifestly unreasonable. Id., at 249-50; see note 15, supra. Moreover, empirical evidence suggests that individual state trial judges are not likely to achieve consistency among death sentences meted out across the state. Gillers, supra note 11, at 58-59; Cook, supra note 24, at 623. Rather the state can better take advantage of the purported ability of judges to ensure consistency in capital sentencing, at no cost to the defendant's right to jury sentencing, by relying on the automatic appeal procedure by which the state supreme court must review each death sentence in comparison to other cases involving similar crimes or defendants. Rev. Neb. Stat. §§ 29-2521.02, .03 (1979). See *Gregg v. Georgia,* supra note 7, 428 U.S., at 204-06; Id., at 211-12 (White, J. concurring).

D. The Sixth and Fourteenth Amendments extend the criminal defendant's right to a jury to capital sentencing decisions.

But for its denial of any right to a jury, Idaho's capital sentencing procedure, Idaho Code §19-2515 is typical of contemporary death penalty schemes. First, the prosecution must establish certain statutorily defined aggravating facts as a predicate to any further consideration of execution as an appropriate punishment. Second, the sentencer must entertain any mitigating evidence proffered by the defendant, and decide whether the mitigating circumstances thus established so outweigh the aggravating circumstances found as to make the death penalty inappropriate in the particular case. See *Lockett v. Ohio*, supra. This second step invokes the defendant's right to jury sentencing as a matter of Eighth Amendment law, since the relative assessment of established aggravating and mitigating facts is essentially a subjective task to be performed in light of the moral and social standards of the community. See subparts B and C, supra. But the first stage of this sentencing scheme -- the establishment of the statutorily defined aggravating facts -- invokes the defendant's right to jury involvement in sentencing under the Sixth Amendment's guarantee of jury trial and the Fourteenth Amendment's due process clause.

In holding to the contrary, the trial court ignored the unique nature of the modern capital sentencing determination,

a determination which the Supreme Court has since 1972 increasingly recognized as an essentially trial-type proceeding to which trial-type constitutional rights attach.

In the six years since Gregg, the court has progressively acknowledged Fifth and Sixth Amendment rights in capital sentencing proceedings even if those particular constitutional guarantees might have no place in traditional noncapital sentencing.[17] This line of cases culminated in *Bullington v.*

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[17] In *Gardner v. Florida*, 430 U.S. 349 (1977), the court held it a violation of due process and the Sixth Amendment right to effective counsel for the sentencing judge to rely on confidential portions of a presentence report not disclosed to defendant's counsel. The court explained that the unique "severity and finality" of the death penalty enhanced the defendant's due process rights at the sentencing hearing. 430 U.S., at 357-58 (plurality opinion). In *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam), the state appellate court had affirmed a death sentence on the basis of an aggravating fact not usually found by the jury. The Supreme Court noted the principle of *Cole v. Arkansas*, 333 U.S. 196 (1948), that a state appellate court cannot affirm a conviction onthe basis of another offense of which the defendant had not been convicted by the jury, and extended that principle to the capital punishment determination: "The fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than to the guilt-determining phase of any criminal trial." *Presnell v. Georgia*, supra, 439 U.S., at 16. In *Green v. Georgia*, 442 U.S. 95 (1979)(per curiam) the court held that the state could not mechanistically apply its hearsay rules to exclude otherwise reliable and probative mitigating evidence from the penalty phase of a capital trial, thus extending to capital sentencing the guilt-phase right to exculpatory evidnece recognized by the court in *Chambers v. Mississippi*, 410 U.S. 280 (1973). And this last Term, in *Estelle v. Smith*, 101 S.Ct. 1866 (1981) the Court squarely held that the defendant's Fifth and Fourteenth Amendment privelege against forced self-incrimination attached as firmly in a capital sentencing proceeding as it did in the guilt phase of the trial. As Chief Justice Burger stated for the court:

entitles the defendant to have that fact determined by the jury rather than a sentencing judge." *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961).

E. Absolute denial of jury involvement in capital sentencing permits arbitary imposition of death.

Absolute denial of the right to a jury in capital sentencing invites impermissibly capricious imposition of death. In *Woodson v. North Carolina*, supra, the Supreme Court held that mandatory death penalty laws failed "to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences," "by withdrawing all sentencing discretion from juries in capital cases." 428 U.S. at 302 (plurality opinion). Woodson noted that bacause

> American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes...it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict... Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in Furman by resting the penalty determination on the particular jury's willingness to act lawlessly.

Ibid. The plurality found this argument equally compelling for a statute that built aggravating circumstances into the definition of capital crimes. *Roberts v. Louisiana*, 428 U.S. 325, 334-35 (1976) (plurality opinion).

The point applies with equal force under a scheme like Idaho's where the jury knows that a conviction is a predicate

facts defined by express statutory standards, and different from those proved at the guilt phase of the trial. The prosecution does not perform the traditional task of recommending a sentence to the sentencer, but rather takes on the burden of establishing these statutorily defined facts beyond a reasonable doubt. Id., at 1855-56. Thus, "[t]he presentence hearing resembled and, indeed in all relevant respects was like the immediately preceding trial on the issue of guilty or innocence." Ibid. Specifically, in this unique sort of sentencing procedure, the statutory scheme "explicitly requires the jury to determine whether the prosecution has 'proved its case.'" Id., at 1855-56, 1861.

Where proof of specified facts may determine whether a defendant will live or die, the constitutional requirement of the procedure controlling that proof cannot depend on the state's choice of the stage of the litigation at which the proof is to cocur. If, as here, the determination of certain statutorily defined facts "may be of greater importance than the difference between guilt and innocence for many lesser crimes," the state cannot avoid the constitutional requirements for proof of those facts "by characterizing them as factors that bear solely on the extent of punishment." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). As Judge Friendly has stated, where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment" and increases the severity of the sentence, "the Sixth Amendment

Missouri, 101 S.Ct. 1852 (1981), expressly recognizing that a separate capital sentencing proceeding at which aggravating circumstances are determined and measured against mitigating circumstances is, for practical and constitutional purposes, a trial. The specific question in Bullington was whether the Fifth Amendment's double jeopardy principle applied to a sentencing jury's decision to impose a sentence of life imprisonment instead of death. Id., at 1854. In ruling that the double jeopardy guarantee did apply, the court held that, unlike traditional forms of sentencing to which no jeopardy could attach, a separate capital sentencing proceeding involves the adversary determination of controlling issues of specific fact, so that a decision not to condemn the defendant to death in such a proceeding amounts to an acquittal. Id., at 1858. The court explained that the sentencer under Missouri's capital punishment scheme, unlike a judge in traditional sentencing, is not given wide discretion to select an appropriate punishment from a range of choices authorized by statute. Rather, the sentencer must choose between two clear alternatives. Ibid. In doing so, the sentencer must look to

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(footnote 17 continued)

> We can discern no basis to distinguish between the guilt and penalty phases of [a]...capital murder trial so far as the protection of the Fifth Amendment privelege is concerned. Given the gravity of the decision to be made at the penalty phase, the state is not relieved of the obligation to serve fundamental constitutional guarantees.

to a death sentence, yet after conviction has no control over the decision whether or not to impose death. See *Beck v. Alamabama,* supra, 447 U.S., at 642-43. When the determination of the death sentence is removed from the jury, whatever form that removal takes, the possibility of jury nullification arises, and the jury's determination at the guilt phase is confounded with its speculation as to what the sentencer shall do. Michael & Wechsler, A Rationale of the Law of Homicide II, 37 Col. L. Rev. 1261, 1265 (1937).

F. The Court erred under the constitutional safeguards of the Eighth and Fourteenth Amendments in applying the death sentence to an "aider and abetter".

The trial court could not find that the Defendant directly committed the offense charged, "there is no doubt that no such finding can be made." Clerk's Record, p. 699, L. 3. Imposition of the death penalty for an "aider and abetter" is inconsistent with the Eighth and Fourteenth Amendments. Recently, in this term, the Supreme Court in *Enmund v. Florida,* ___ U.S. ____ (1982), 50 L.W. 5087 held that a person constructively convicted of first degree murder by application of the "felony/murder rule" where a co-defendant actually committed the acts of robbery and murder, violated the Eighth and Fourteenth Amendments.

The legitimate purpose for the death penalty is less served by the punishment of death to an aider and abetter.

Different degrees of participation or culpability in a criminal offense can be without jury affect under instructions of Idaho definition of a principle. Idaho Code §18-204. Clerk's Record ___, Instruction No. ___. However, the punishment of death, which is "unique in its severity and irrevocability" *Gregg v. Georgia*, 428 U.S. 153, 187 is an excessive penalty for an aider and abetter.

B.

EVIDENCE TENDING TO SHOW DEFENDANT'S COMMISSION OF AN UNRELATED CRIME SHOULD NOT HAVE BEEN ADMITTED.

Prior to trial, Defendant Gibson moved the trial judge for an Order dismissing the Information against the Defendant or to exclude all evidence of Scott Currie's murder. R. Vol. II, p. 383, R. Vol. II, p. 404, and R. Vol. II, p. 511.

No ruling was made on this Motion until Defendant renewed it by way of an objection at trial. Tr. Vol. I, pp. 71-73. At that time, the trial judge denied the Motion. Tr. Vol. I, p. 76.

Throughout the trial, Defendant Gibson objected to evidence relating to the murder of Scott Currie: the admission of Plaintiff's Exhibits 92 and 93, pictures of Currie's body as found within a sleeping bag on Mellick Road, Tr. Vol. II, p. 341; the photographs of the male body inside the blue sleeping bag (Plaintiff's Exhibit 95) on Mellick Road, Tr. Vol. III, p. 581; the motel receipt (Plaintiff's Exhibit 89), found with Scott Currie's body, Tr. Vol. III, p. 588; the cloth found around Scott Currie's neck (Plaintiff's Exhibit 146) and wrist (Plaintiff's Exhibit 147) and a large piece of cloth found at the Dearborn residence in Spokane (Plaintiff's Exhibit 149), Tr. Vol. IV, p. 694; the hair found at the Dearborn residence (Plaintiff's Exhibit 60) and sample of

Scott Currie's hair (Plaintiff's Exhibit 145), Tr. Vol. IV, p. 697; Currie's jeans and belt (Plaintiff's Exhibit 13) and belt buckle (Plaintiff's Exhibit 12), Tr. Vol. IV, p. 703; autopsy pictures of Currie (Plaintiff's Exhibits 142, 143 and 144), Tr. Vol. IV, pp. 779-780.

Defendant's objection was treated as a continuing objection to all testimony relating to Currie's death at the Dearborn residence in Spokane and the cause of his death. This would include the testimony of Detective McCabe, Tr. Vol. I, pp. 175-216, Vol. II, pp. 217-258; and testimony of Dr. Brady relating to Currie, Tr. Vol. IV, pp. 790-792.

Defendant Gibson contends that the admission of this evidence, which tends to show him guilty of a crime for which he had been acquitted, deprived him of a fair trial and violated his constitutional rights.

This contention is supported by two arguments:

1. The exceptions to the general rule of evidence, which excludes proof of an unrelated criminal act, should not apply when the defendant has been found not guilty of that criminal act.

2. The double jeopardy clauses of the United States and Idaho Constitutions should exclude evidence of a crime for which a defendant was acquitted.

1.

As a general rule, evidence of an unrelated crime is not admissible. *State v. Wrenn*, 99 Idaho 506, 510, 584 P.2d 1231, 1235 (1978). The reason for this rule is fundamental to a fair trial. If the jurors believe a defendant committed the unrelated crime, they are more likely to believe he committed the crime of which he is charged. *State v. Shepherd*, 94 Idaho 227, 229, 486 P.2d 82, 84 (1971). Additionally, this kind of evidence forces a defendant to defend against something not alleged in the Information. This too is fundamentally wrong. *State v. Gumm*, 99 Idaho 549, 551, 585 P.2d 959, 961 (1978) and *State v. McMahan*, 57 Idaho 249, 250, 65 P.2d 156, 159-160 (1937).

Exceptions to the general rule exist. *State v. Shepherd*, 94 Idaho at 230, 486 P.2d at 85. Defendant concedes that, but for his acquittal for the crime, evidence of Scott Currie's murder would have been admissible. It was evidence of "a common...plan of two or more crimes so related...that proof of one tends to establish the other..." *State v. Izatt*, 96 Idaho 667, 670, 534 P.2d 1107, 1110 (1975). Or it was proof of Defendant's motive. *State v. Shepherd*, 94 Idaho at 230, 486 P.2d at 85.

But the Defendant Gibson was acquitted of the murder of Scott Currie. He had been through the ordeal of a jury trial and had been found not guilty. For the Prosecutor to use

evidence tending to show the Defendant had murdered Scott Currie forced him to defend against that accusation a second time.

Three State Supreme Courts have adopted this reason for not allowing evidence of an unrelated crime when the defendant has been acquitted of that crime. *McMichael v. State*, 638 P.2d 402 (Nev. 1982), *State v. Perkins*, 349 S.2d 161 (Fla. 1977), and *State v. Little*, 87 Ariz. 295, 350 P.2d 756 (1960). Without holding that the use of evidence of a crime for which a defendant has previously been tried violated the collateral estoppel doctrine or double jeopardy clause, the Nevada, Florida and Arizona courts said it was unfair for a defendant to have to defend a second time against acquitted crimes:

> It is inconsistent with the notions of fair trial for the state to force a defendant to resurrect a prior defense against a crime for which he is not on trial.

State v. Perkins, 349 S.2d at 163.

Admittedly, the prior acquittals in McMichael, Perkins, and Little, were from trials held in the same state as the second trials. But the reasoning behind those decisions applies to a case where the acquittal was in one state and the second trial in another state.

2.

The double jeopardy clauses of the United States and Idaho Constitutions should also preclude admission of evidence of acquitted crimes.

The argument that the United States Constitution precludes this kind of evidence is based on the following principles:

a. The Fifth Amendment's double jeopardy clause is binding on the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

b. The doctrine of collateral estoppel is embodied within the Fifth Amendment's double jeopardy clause. *Simpson v. Florida*, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971) and *Ashe v. Swenson*, 397 U.S. 439, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

c. Collateral estoppel should prevent the admission of all evidence of a criminal act of which a defendant has been acquitted. See, *United States v. Keller*, 624 F.2d 1154 (3d Cir. 1980), *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979), *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978), and *State v. Funkhower*, 30 Wash. App. 617, ____, 637, P.2d 974, 980 (1981).

d. Collateral estoppel should prevent the admission of evidence of an acquitted crime even when the acquittal was

from a trial in another state.

That the first two principles are controlling law is beyond argument. *Simpson v. Florida*, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971).

The third principle, that collateral estoppel makes all evidence of an acquitted crime inadmissible, has been adopted by several federal circuit courts. See, *United States v. Keller*, 624 F.2d 1154 (3d Cir. 1980), *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979), and *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978). Although not controlling authority, these decisions of federal courts on the meaning of the federal constitution are certainly persuasive.

A ninth circuit decision contains dictum suggesting that that circuit court would apply collateral estoppel to all evidence of an acquitted crime.

In *United States v. Powell*, 623 F.2d 754 (9th Cir. 1980), the defendant was tried on a two count indictment. The first count alleged conspiracy to possess marijuana with intent to deliver; the second count alleged possession of the same marijuana. The jury convicted the defendant of conspiracy but acquitted him on the possession charge. Following his appeal, the circuit court reversed the defendant's conspiracy conviction. On remand, the defendant faced reprosecution on the conspiracy allegation.

The defendant's second appeal, before his reprosecution,

presented the circuit court with two issues. First, could the defendant be reprosecuted for conspiracy to possess marijuana when he had been found not guilty of possessing the same marijuana? The court of appeals said that had possession of the marijuana been the only overt act in the conspiracy allegation, reprosecution might have been barred. Because the conspiracy allegation contained other overt acts of the defendant there could be a second trial.

The second issue was whether the prosecution could use evidence of the defendant's possessing the marijuana as an overt act in the conspiracy. The appellate court declined to rule on this issue, holding that it lacked jurisdiction because the trial court had not made a final decision.

Nevertheless, the ninth circuit court seemed to suggest that evidence of the defendant's possessing marijuana should be excluded. 623 F.2d at 758.

The Defendant urges the court to adopt an interpretation of the collateral estoppel doctrine that would prevent the admission of all evidence of a crime for which a defendant has been acquitted.

The fourth principle is more difficult to support. A strict application of collateral estoppel, which requires identity of parties, would seem to allow an Idaho prosecutor to use evidence of an acquitted crime if that acquittal was from another state.

Two comments will be made to clarify the merits of the fourth principle.

The first comment is that allowing evidence of a crime for which the defendant was acquitted in another state is not at all analogous to allowing successive state and federal prosecutions based on the same criminal act.

Successive state/federal prosecutions have been held not to violate the Fifth Amendment's double jeopardy clause. *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) and *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). These successive prosecutions are based on the idea of "dual sovereignty": a person is a citizen of both the state and the United States; he owes allegiance to both; if he commits an act that violated the laws of both sovereigns, he can be prosecuted for both violations. Double jeopardy is not violated because there is only one prosecution for each law violated.

Using evidence of a crime for which a defendant has been acquitted in another state, however, makes a defendant defend twice for the violation of a single law. Preventing a person from having to go through the ordeal of a trial twice for the same crime is the purpose of the double jeopardy clause.

The second comment is that the identity of parties requirement is derived from civil law; its application to criminal law in a federal system is inappropriate. Collateral

estoppel in a criminal case is a constitutional right. The double jeopardy clause contains no exception for a second prosecution if it is done by another state.

Idaho's Constitution, Article I, Section 13, also protects a person from double jeopardy. Our Supreme Court may accord greater double-jeopardy protection under our Constitution than is given by the federal Constitution. See, *People v. Belcher*, 113 Cal. Rptr. 1, ____, 520 P.2d 385, 389 (1974).

By permitting the jury to hear evidence tending to show the Defendant Gibson was involved in the murder of Scott Currie, the Defendant was deprived of a fair trial and denied his privelege against double jeopardy. For both these reasons the trial court errored.

C.

THE TRIAL COURT ERRED IN NOT INCLUDING IN ITS INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE DIRECTIONS TO THE JURY THAT, WHEN CIRCUMSTANTIAL EVIDENCE IS SUSCEPTIBLE OF AN INTERPRETATION POINTING TO THE DEFENDANT'S INNOCENCE, THE JURY MUST ADOPT THAT INTERPRETATION.

The trial court's first instruction to the jury was given before any evidence was presented. Jury Instruction No. 1. Tr. Vol. I, pp. 6-13. The Defendant was not given an opportunity to object to that instruction before it was read to the jury.

Part of that first instruction dealt with circumstantial evidence. The jury was informed:

> The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and <u>each is respected for such convincing force as it may carry</u>.

Jury Instruction No. 1, p. _____, L. _____, Tr. Vol. I, p. 11, L. 9-13.

The jury was not told that if the circumstantial evidence can be interpreted as proving the Defendant's innocence as well as his guilt, the jury must reject the interpretation that points towards his guilt.

This omission was significant in light of the evidence presented at Defendant's trial. The only evidence of Defendant's committing first degree murder was circumstantial. In essence, that evidence was:

1. Defendant Gibson frequented the Spokane residence at which the victim and her boyfriend were, or were near, close to the time of the murder.

2. Defendant Gibson was seen leaving the general vicinity where the victim's body was found, close to the time of the murder.

3. Defendant Gibson went to California soon after the murder.

Direct evidence was presented in the form of the Defendant's testimony. Tr. Vol. II, pp. 946-977. His testimony, however, established, at most, his guilt as accessory after the fact. It was not evidence of his committing first degree murder.

In order for the jury to convict Thomas Gibson of first degree murder, it had to rely on circumstantial evidence.

Defendant believes (1) the omission of the circumstantial evidence instruction was clearly error, and (2) the Supreme Court should review this error even though Defendant failed to object to trial court's omission.

(1)

The same issue was presented to the court in *State v. Holder*, 100 Idaho 129, 132-133, 594 P.2d 639, 642-43 (1979) and *State v. Davis*, 69 Idaho 270, 272, 206, P.2d 271, 272-74 (1949). In both cases the convictions were reversed because the trial courts should have instructed the jury that,

> [I]f the evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt.

State v. Holder, 100 Idaho at 132, 594 P.2d at 642.

The Court of Appeals of Idaho recently followed the rule from Holder in *State v. Curry*, _ Ida. App. ___, 647 P.2d 788 (1982).

The importance of telling the jurors that if the circumstances can be viewed as proving the Defendant innocent of first degree murder, then they must find him not guilty of that crime, is obvious when the Defendant's testimony is considered. He testified:

1. He was at the Spokane residence when the victim's boyfriend was killed. Tr. Vol. V, pp. 949 and 951.

2. He grabbed the victim as she attempted to flee from the Spokane residence. Tr. Vol. V, pp. 952-953.

3. He witnessed Larry Evans, co-defendant, kill the victim. Tr. Vol. V, p. 953.

4. He helped transport the bodies of the victim and her boyfriend to Idaho. Tr. Vol. V, p. 954.

This testimony was entirely consistent with the rest of the evidence presented at trial, which was all circumstantial. If the jurors believed the Defendant's testimony, but also

believed other evidence, e.g., Dr. Brady's testimony at Tr. Vol. IV, pp. 824, 826, what verdict should they have rendered?

If the instruction on circumstantial evidence, which is required by Holder and Davis, had been given and the jurors had believed the Defendant, they could not have found him guilty of first degree murder. Without this instruction, they could have believed him and still found him guilty.

(2)

Normally, a defendant's failure to object to a jury instruction at trial is a waiver of its review on appeal. *State v. Owens*, 101 Idaho 632, 640, 619 P.2d 787, 795 (1980) and *State v. McCurdy*, 100 Idaho 683, 686, 603 P.2d 1017, 1020 (1979). If fundamental error is involved, however, the Supreme Court will review. *State v. LePage*, 102 Idaho 387, 390 , 630, P.2d 674, 677 (1981), *State v. White*, 97 Idaho 708, 714, 551 P.2d 1344, 1350 (1976) n. 8, *State v. Cariaga*, 95 Idaho 900, 904, 523 P.2d 32, 35 (1974).

Fundamental error has been defined as going to the basis of a defendant's right, or to "the foundation of the case", or something that is "essential to his defense". *State v. Garcia*, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942), cited with approval in *Smith v. State*, 94 Idaho 469, 475, 491 P.2d 733, 739 (1971) n. 13.

The circumstantial evidence in this case pointed both towards the Defendant's guilt and innocence. Defendant's

testimony, by which he incriminated himself as an accessory after the fact, certainly shows that a proper instruction on circumstantial evidence was essential to his defense and the foundation of the case.

The Supreme Court of Arizona has held that when the state's case consists solely of circumstantial evidence, the jury must be instructed that it can render a guilty verdict only if the evidence is "inconsistent with every reasonable hypothesis of innocence", and failure to so instruct is reversible error even if the defendant failed to object at trial. *State v. Love*, 106 Ariz. 215, ____, 474, P.2d 806, 807 (1970).

The Defendant argues that the required instruction on circumstantial evidence is a basic instruction on the law that should have been given by the court as part of its stock instructions. The Supreme Court has interpreted Idaho Code §19-2132 to require the trial court, on its own, to give,

> [P]ertinent instructions by which the jury may be correctly informed with respect to the nature and elements of the crime charged and to the <u>essential legal principles applicable to the evidence that has been admitted</u>.

State v. Benson, 95 Idaho 267, 275, 506 P.2d 1340, 1348 (1973) (some emphasis added) (citations omitted).

The omitted instruction on circumstantial evidence was certainly an "essential legal principle" when evidence of first degree murder was entirely circumstantial.

D.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DEFENDANT'S STATEMENT, MADE IN CALIFORNIA, IN VIOLATION OF IDAHO CODE SECTION 19-853.

The Prosecutor's witness, Robert Maloney, testified to a statement by the Defendant Gibson while he was in jail in Glenn County, California. Tr. Vol. II, p. 277. Maloney was a California District Attorney, and before he asked the Defendant any questions he informed him of his rights, as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Defendant waived those rights. Tr. Vol. II, pp. 280-281.

Before trial, the Defendant moved the court for an order suppressing the statement. R. Vol. II, p. 492. And again, before Maloney testified, the Defendant renewed his objection. Tr. Vol. II, p. 260.

Defendant's argument for suppression of his statement was that it was obtained without compliance with Idaho Code §19-853.

That Code Section requires a law enforcement officer, who detains a person charged with a serious crime, to inform that person of his right to legal counsel and the right of an indigent person to legal counsel at public expense. In addition, Code Section 19-853 requires that the information given the detained person be "in writing or otherwise recorded", that the person's acknowledgement of receiving the information be

recorded (or his refusal to acknowledge receipt be recorded) and that this recorded material be filed with "the court next concerned".

If the detained person is not informed of his right to counsel in writing, or "otherwise recorded", it is not "effective".

(1)

A statement obtained in violation of Code Section 19-853 should be suppressed.

The Idaho Supreme Court has previously sanctioned suppression of evidence obtained in violation of a statutory right. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978). See, *United States v. Genser*, 582 F.2d 292, at 308 (3d Cir. 1978), for other authority mandating suppression when a government agent violates statutory directives.

The direct connection between Code Section 19-853 and the constitutional right to legal counsel makes suppression a compelling remedy for violating the statute.

The right to legal counsel is guaranteed by both the United States and Idaho Constitutions. U.S. Const. Amend. VI and Idaho Const. Art. I, §13. See, *State v. LePage*, 102 Idaho 387 at 392, 630 P.2d 674, 676-677 (1981) and *Pharris v. State*, 91 Idaho 456, 458, 424 P.2d 390, 392 (1967). The Sixth Amendment right to counsel is binding on the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S.

335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

That a detained person must be advised of his right to counsel, if he is questioned while he is in custody, was established in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) See also *State v. Ybarra*, 102 Idaho 573, 634 P.2d 435 (1981).

The apparent purpose of Code Section 19-853 is to eliminate any dispute over whether a detained person has been properly advised of his right to legal counsel. Idaho, of course, can grant its citizens greater constitutional protection than that afforded by the United States Constitution. *O'Conner v. Johnson*, 287 N.W.2d 400 (Minn. 1979). That is what the Idaho legislature has done by requiring that the advice on right to counsel be in writing and filed with a court.

If a detained person is not advised, in writing, of his right to legal counsel, that advice is not "effective", and any statement by that person should be suppressed.

(2)

Code Section 19-853 should apply to the Defendant's statement, which he made while incarcerated in the Glenn County jail, and which was testified to in an Idaho court.

The first reason to apply this Idaho statute is because there was no proof of California's law. The trial court had no knowledge of whether California required that advice on

right to counsel be in writing. Absent any proof of California law, the trial court should have applied Idaho's law.

It is well recognized that unless there is pleading and proof of the law of another jurisdiction, a court will presume that jurisdiction's law is the same as Idaho's. *Barthel v. Johnston*, 92 Idaho 94, 96, 437 P.2d 366, 368 (1968). Also see *Lomas & Nettleton Co. v. Tiger Enterprises*, 99 Idaho 539, 541, 585 P.2d 949, 951 (1978) n. 4 and *Reynolds v. Continental Mortgages Co.*, 85 Idaho 172, 178, 377 P.2d 134, 137-138 (1962).

(3)

A second reason Code Section 19-853 applies to Defendant's statements is becuase that statement was offered in an Idaho court.

The right to legal counsel, which is implemented by Code Section 19-853, is not violated until the statement of the detained person is used in court. If a statement is obtained without a recorded advising of right to counsel but the statement is not used in court, there is no harm done. The lack of a recording simply means the advice is not effective. Use of the statement as evidence, however, without effectively advising a detained person of his right to counsel, means that constitutional right is violated.

In Idaho, our legislature has prescribed how a person is to be informed of his right to counsel. If a statement is

obtained without following the prescription of Section 19-853, the advice is not effective, and to use it in an Idaho court would violate the detained person's right to counsel. That violation would be in Idaho.

Unlike a search and seizure that violates the Fourth Amendment, where the harm is done at the time of the unlawful search, a Sixth Amendment violation happens when the statement, taken in absence of assistance of counsel, is used against the defendant. See, *Brulay v. United States*, 383 F.2d 345, at 349 (9th Cir. 1967) n. 5.

Both because of the presumption that California law is the same as Idaho's and because the constitutional violation occured at the time the statement was used in an Idaho court, the requirements of Code Section 19-853 should apply to the Defendant's statement. The trial court erred in failing to do so.

E.

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL WHEN A PROSECUTION WITNESS REFUSED TO TESTIFY.

The Prosecutor called John V. Colis as a witness. After stating his name and address, Mr. Colis's attorney stepped before the court and instructed his client not to answer any more questions on the ground that his answers might incriminate him. Tr. Vol. III, pp. 527-529.

It is significant that the jury was present up until Mr. Colis's attorney finished saying he represented Mr. Colis and they had discussed his court appearance at great length. Tr. Vol. III, p. 528, L. 6-10.

The Defendant requested a mistrial, which was denied. Tr. Vol. III, p. 530. The trial court then instructed the jury to disregard Mr. Colis's appearance. Tr. Vol. III, p. 531, L. 15-18.

In post-trial proceedings, it was learned that Mr. Colis's attorney told the Prosecutor's investigator, Jack Pintler, approximately 5-10 minutes before Colis was called as a witness, that Colis would take the Fifth Amendment. R. Vol. III, pp. 659 and 672. The investigator passed that information to a sheriff's deputy, R. Vol. III, pp. 660-61, who told the message to a deputy prosecutor. R. Vol. III, p. 659.

The message changed during its transmission. Colis's attorney told the investigator that his client would not testify.

When the sheriff's deputy relayed the message it was "Colis probably will not answer any questions". R. Vol. III, p. 660. The deputy prosecutor who was seated at counsel's table in the courtroom said the message was that Colis <u>might</u> not answer any questions. R. Vol. III, p. 659.

The trial court found that the Prosecutor did not know Mr. Colis would invoke his Fifth Amendment privelege against self-incrimination. R. Vol. III, p. 676. Defendant's Motion for a new trial and a judgment of acquittal based on this ground was denied. R. Vol. III, p. 677.

The United States Supreme Court has said there are two situations in which a witness' assertion of the Fifth Amendment can be reversible error. *Namet v. United States*, 373 U.S. 179 187-188, 83 S.Ct. 1151, ____, 10 L.Ed.2d 278, 283-284 (1963).

If the prosecutor "makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privelege," a conviction should be reversed. Or, under the facts of a given case, reversal is justified if "inferences from a witness' refusal to answer added critical [sic] weight to the prosecutor's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant". <u>Id</u>.

The evidence in this case does not support a claim that the

Prosecutor consciously attempted to build his case around Colis's refusal. But certainly the inferences from that refusal help the prosecution and hurt the Defendant. Colis's appearance made a difference in the trial.

The most that Colis would have said, had he testified, was that he picked up the Defendant and his two companions on June 21st, at Post Falls, Idaho, and drove them to a residence on Dearborn, in Spokane. This would have added little to the Prosecutor's case. Colis's brief appearance and his attorney's dramatic entrance, however, told the jury Colis had something important to say, but he would not say it.

And the Prosecutor knew Colis would not testify. He had that information before Colis was called. He could have asked for an in camera examination. Instead, the Prosecutor called Colis to the stand, and, in front of the jury his attorney appeared to assert his Fifth Amendment privelege.

How much did the appearance by Colis hurt the Defendant is impossible to say. It should be the State's burden to show there was no harm.

> Once the state has obtained the benefit of the inference of defendant's guilt, it cannot have the benefit of presumption that this inference was not prejudiced and shift the burden to defendant to show there was prejudice.

State v. Vega, 85 N.M. 269 at ____, 511 P.2d 755, at 758 (1973).

F.

THE TRIAL COURT ERRED IN NOT DISQUALIFYING THE KOOTENAI COUNTY PROSECUTOR'S OFFICE BECAUSE OF AN APPEARANCE OF IMPROPRIETY.

Before trial, Defendant Gibson moved the trial court to disqualify the Kootenai County Prosecutor's Office from representing the State of Idaho. R. Vol. II, p. 486. The Motion was made because an attorney who worked at the Public Defender's Office, while it represented the Defendant, had gone to work at the Prosecutor's Office.

The trial court refused to disqualify the Prosecutor's Office. He did order, however, that the attorney, Michael Kane, could not participate in the prosecution of the Defendant. R. Vol. III, p. 579. The trial court's written opinion, R. Vol. III, pp. 562-579, made certain findings, which can be summarized as follows:

1. Between October 1, 1980, and March 13, 1981, Michael Kane was associated, as one of three attorneys, in the law office that held the Public Defender's contract.

2. On November 25, 1980, the Public Defender's Office was appointed to represent the Defendants Gibson and Paradis.

3. On December 5, 1980, the Public Defender's Office withdrew from its representation of Defendant Gibson.

4. On April 24, 1981, the Public Defender's Office withdrew from its representation of Defendant Paradis.

5. On March 16, 1981, Michael Kane went to work at the Prosecutor's Office as a deputy prosecutor.

Defendant's trial was held on June 22-30, 1981. The trial court found there was no actual conflict of interest in attorney Kane's employment at the Prosecutor's Office. R. Vol. III, p. 567. The court felt the issue was whether there was such an appearance of impropriety that the Office of the Prosecutor should be disqualified. R. Vol. III, p. 569.

Decisions from three other jurisdictions have held that the Prosecutor's Office should be didqualified when an attorney, who had been representing a defendant, goes to work for the prosecutor. *People v. Shinkle*, 51 N.Y.2d 417, 415, N.E.2d 909, (1980), *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (1974) and *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972).

Defendant Gibson contends the trial court should have disqualified the Prosecutor's Office from representing the State in this case, and he feels he was denied a fair trial because one of the attorneys who had represented him worked as a deputy prosecutor during the Defendant's prosecution. Disqualification is especially warranted because:

1. Attorney Kane had been one of only three attorneys in the Public Defender's Office. In a small office, receipt of information about a case, however subtly, is very likely.

2. The Public Defender's Office represented co-defendant

Paradis from November 25, 1980, to April 24, 1981. See, *Martin v. United States*, 335 F.2d 945 (9th Cir. 1964).

3. Defendant Gibson was charged with first degree murder, in what must have been considered "sensational" by those involved in its prosecution. Within the Prosecutor's Office the expression of thoughts about the case was more likely than about more mundane cases.

That attorney Kane never consciously or unconsciously acquired or divulged information about the Defendant's case does not remove the appearance of his opportunity to do so. It was the appearance of impropriety that denied the Defendant his fair trial.

G.

PROSECUTOR'S IMPROPER CLOSING ARGUMENT DENIED DEFENDANT A FAIR TRIAL.

The Defendant contends that the Prosecutor's closing argument contained two acts of misconduct that were so prejudiced that Defendant is entitled to a new trial. Those two acts of misconduct were:

1. Commenting on the Defendant's silence before trial, and,

2. Discussing matters not in evidence for the purpose of appealing to the jurors' passions and prejudices by saying their job was a link in the chain of law enforcement between the police, who made the arrest, and the judge, who imposed the penalty.

1.

When the Defendant Gibson testified he told the jury, on direct examination, that he had not taken the witness stand during his Washington trial. Tr. Vol. V, p. 950, L. 10-16. The Defendant also told the jury how the murder happened.

The Prosecutor, in his closing argument, told the jurors that they should disbelieve the Defendant's version of the murder because he had not told it before. The Prosecutor said,

> "Its very strange that we have waited until a year has gone by, that the defendant has already been once in

> jeopardy in the State of Washington and acquitted, and then now he wants to tell the whole story, that of course he says it happened over there. Why didn't he say this a year ago? What assurance does Mr. Vrable have to give to you that they can be retried again in the State of Washington?"

Tr. Vol. V, p. 1038, L. 1-7 (emphasis added).

This was a clear reference to the Defendant's not testifying at his Washington trial. Both before and after the sentence "Why didn't he say this a year ago?" the Prosecutor mentions the trial in the State of Washington.

It is fundamental that a defendant has a right to remain silent and not testify at trial. Fifth Amend. U.S. Const. and Idaho Const. Art. I, §13. Nor can a Prosecutor comment to the jury on a defendant's exercise of his right not to testify. *Griffith v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

It is also fundamental that a Prosecutor cannot question a defendant about his failure to testify at a preliminary hearing. *State v. Haggard*, 94 Idaho 249, 251-52, 486, P.2d 260, 262-63 (1974). For the same reason that a defendant's silence at a preliminary hearing is sacred, so should be his silence at a prior trial on the same matter.

That Defendant Gibson told the jury, on his own, that he had not testified does not "open the door" for further comment on the Defendant's remaining silent. Using a

defendant's silence to raise an inference of guilt has been held to be fundamental error. *State v. White*, 97 Idaho 708, 714-15, 551, P.2d 1344, 1350-51 (1976).

In White, the defendant told the police, at the time of his arrest, that he had an alibi--he had been with the victim. When the police said he was charged with kidnapping the victim, the defendant decided not to say anymore. At trial, the defendant testified to what he had told the police. On cross-examination, the Prosecutor brought out that the defendant had not given the police a complete statement. Our Supreme Court said this was fundamental error. Id., at 714, 551 P.2d at 1350 n. 8.

> It is unclear whether the purpose and effect of the prosecutor's questions in this case were to raise an inference of guilt or to impeach appellant's testimony. In either case, the questions were improper.

Id., at 715, 551 P.2d at 1351 (emphasis added).

And in the same way, it was improper for the Prosecutor to argue to the jury that Defendant Gibson's not testifying in a prior trial was reason to believe he was guilty.

Defendant's objection to this argument was overruled by the trial court. Tr. Vol. V, p. 1038, L. 8-11.

2.

The Prosecutor concluded his argument to the jury by comparing the criminal justice system to a chain. Tr. Vol. V,

pp. 1040-42. The jury, he said, was one of the links in the chain.

> "[T]he third link in that chain is a jury which is willing to listen to all the evidence and reach a just verdict and to hold a defendant accountable for his acts under the law."

Tr. Vol. V, p. 1041, L. 21-24 (emphasis added).

The Prosecutor then said the other links in the chain had done their duties. "The time has come for you to fill yours." Tr. Vol. V, p. 1042, L. 6-8. The police had done their job by arresting the Defendant, the Prosecutor had done his by prosecuting.

> "The time has come, ladies and gentlemen, for you to do your duty in this chain of just law enforcement. Don't leave it to some other jury some other time to do your job. There is nobody that can set in your chair and reach the decision that must be reached in this case."

Tr. Vol. V, p. 1042, L. 15-20 (emphasis added).

Clearly, the Prosecutor equated the jurors' duty with a guilty verdict and associated the police, prosecutor, judge and jury as working towards the same end result.

The Defendant objected through out this phase of the Prosecutor's argument. His objections were overruled.

In Idaho, a prosecution is not supposed to make arguments calculated to appeal to the passions and prejudices of the jurors. *State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980), *State v. Spense*, 74 Idaho 173, 258 P.2d 1147

(1953) and *State v. Givens*, 28 Idaho 253, 152 P. 1054 (1915).

But the link-in-the-chain argument is aimed at just that. It is designed to cause the jurors to believe that the police, prosecutor and judge are on the same team. The police have arrested the Defendant, the Prosecutor has prosecuted him, and the Judge wants to sentence him. If the jurors want to be part of the team, they must convict him.

Certainly, the aim of this argument is wrong. To suggest such a connection between law enforcement and the judiciary not only is irrelevent, it is false.

In at least one other jurisdiction, it was held to be improper for a prosecutor to suggest to the jury that the prosecutor and the judge were on the same team. *State v. Woodward*, 21 Ariz. App. 133, ___, 516 P.2d 589, 590 (1973).

Because of two acts of misconduct in the Prosecutor's closing argument, the Defendant's conviction should be reversed. It is clearly far from certain that the misconduct was harmless. See, *State v. Griffith*, 101 Idaho 163, 167, 510 P.2d 522, 526 n. 1 (1980).

H.

THE TRIAL COURT ERRED IN NOT DISMISSING THE INFORMATION FOR LACK OF PROBABLE CAUSE AT THE PRELIMINARY HEARING

After the Magistrate bound the Defendant over to district court on first degree murder, R. Vol. I, p. 135, the Defendant moved that the Information against him be dismissed. R. Vol. II, p. 380. That Motion was made pursuant to Idaho Code §19-815A.

The trial court reviewed the transcript and record of the preliminary hearing and held there was sufficient probable cause for the Magistrate's believing the Defendant Gibson was guilty of first degree murder. R. Vol. II, pp. 462-482.

The evidence presented at the preliminary hearing can be summarized as follows:

1. Kimberly Palmer was last seen alive by her mother on Thursday, June 19th. Shortly after 5:00 p.m. she and her boyfriend, Scott Currie, drove away from her residence in Spokane in a blue and white VW van. Prelim. Tr. Vol. III, pp. 354 and 358.

2. On Saturday morning, at 12:45 a.m., Scott Currie checked in and out of the Paul Bunyan Motel in Spokane. Mr. Currie was driving the blue and white VW van and was accompanied by a woman. That woman could have been Ms. Palmer. Prelim. Tr. Vol. III, pp. 367-370.

3. The Paul Bunyan Motel is within a couple of blocks of the residence at 24 Dearborn in Spokane. Prelim. Tr. Vol. III, p. 465.

4. On Saturday morning, June 21st, at approximately 6:30 or 6:45 a.m., the blue and white VW van was seen travelling up a dirt road approximately 2-1/2 miles south of Post Falls. This was Mellick Road.

Ruth Jones saw at least two people in the van. She could not tell whether they were men or women. Prelim. Tr. Vol. I, p. 23, L. 5-12.

5. Approximately one-half hour later, 7:00 - 7:15 a.m., Mrs. Jones saw three men walking north down Mellick Road. They were coming from the direction the van had gone. Prelim. Tr. Vol. I, p. 25.

One of the men was heavy set, dark complexioned, with long hair, and who was about 25 to 30 years old. This man wore a dark colored, sleeveless shirt.

Mrs. Jones could not describe the other two men other than that they were not as heavy set nor as dark as the first one, and one of the other two was carrying a blue or green blanket or sleeping bag. See, R. Vol. II, p. 464, L. 3-5.

6. At approximately 7:30 a.m. on June 21st, the Defendant was seen walking into Post Falls, from the direction of Mellick Road.

The Defendant was in the company of only one other person

when he entered Post Falls. That other person, Donald Paradis, was dark complexioned, and wearing a dark colored, sleeveless shirt. Prelim. Tr. Vol. II, pp. 308, 314, and 315.

The Defendant was carrying a blue blanket.

7. On Saturday, at approximately 10:30 a.m., the blue and white VW van was found in a ditch off Mellick Road, about 1/2 to 3/4 miles from where Ruth Jones saw it the day before. Prelim. Tr. Vol. I, pp. 32-33.

Later in the day, at approximately 4:30 p.m., (Prelim. Tr. Vol. II, pp. 193-194), the bodies of Scott Currie and Kimberly Palmer were found near the van. Currie was tied up in a sleeping bag; Palmer was lying face down in a creek. Prelim. Tr. Vol. I, pp. 126-134.

Currie's death was caused by beating. Palmer had been strangled.

8. Other evidence showed that Donald Paradis, the man seen with the Defendant in Post Falls, rented the residence at 24 Dearborn, in Spokane. Prelim. Tr. Vol. III, p. 463.

At that residence were found hair that probably came from the head of Scott Currie, terry cloth that matched the material tied to Scott Currie's body, a belt buckle belonging to Scott Currie.

These items were found at the residence on June 23 and 24. Prelim. Tr. Vol. III, pp. 416-420 and pp. 445-447.

Under Idaho Criminal Rule 5.1(b) and (c) a Magistrate presiding at a preliminary hearing cannot hold a defendant to answer to district court unless "there is probable or sufficient cause to believe that the defendant committed" an offense. The rule further requires that the finding of probable cause "be based upon substantial evidence upon every material element of the offense..."

Unless a defendant is properly bound over in a preliminary hearing, the district court lacks jurisdiction to try him. *State v. Ruddell*, 97 Idaho 436, 439, 546 P.2d 391, 394 (1976).

While a Magistrate's finding of probable cause cannot be overturned except upon a clear showing that he was wrong, *Cary v. State*, 91 Idaho 706, 709, 429 P.2d 836, 839 (1967), nevertheless, the evidence at the hearing must be such

> as would lead a reasonable person to believe the accused party has probably or likely comitted the offense charged.

Martinez v. State, 90 Idaho 229, 232, 409 P.2d 426, 427 (1965).

Under the Martinez definition of probable cause and the requirement of Rule 5.1(b) that there be "substantial evidence upon every material element of the offense", the Defendant Gibson could be bound over only if it was likely that:

1. He killed or aided and abetted in killing Kimberly Palmer,

2. The killing was done in Kootenai County, Idaho, and

3. The killing was done with premeditation.

In order to reach a finding that the Defendant killed Palmer, or aided and abetted in her killing, three conclusions must be made:

First, it must be concluded as likely that the Defendant was one of the three men seen walking away from Mellick Road on Saturday morning. Is that conclusion likely when three men were seen on Mellick Road and Defendant was one of only two men seen entering Post Falls? Is it a likely conclusion when Mrs. Jones said one of the men was carrying something that might have been a green sleeping bag, and the Defendant was carrying a blue blanket?

Second, it must be concluded as likely that the three men seen walking away from Mellick Road had travelled there in the blue and white van. Only two persons, who could not even be described as men, were seen in the van when it drove up Mellick Road.

The third conclusion is that it must seem likely that Kimerly Palmer was killed before the three men walked away from Mellick Road.

For there to be a finding that Palmer was killed in Kootenai County, it must be concluded that this was likely. This could have happened. It is also likely she was killed in Spokane and her body transported to Mellick Road along with that of Currie.

That it was likely the killing of Kimberly Palmer was done

with premeditation seems to be unsupported. Only with speculation can this be called a likely conclusion.

A finding that the Defendant killed Kimberly Palmer, in Kootenai County, with premeditation, is too attenuated to be called likely.

CONCLUSION

For the reasons set forth in this Appellant's brief, the Defendant respectfully requests that this case be reversed and remanded for a new trial or for such further relief as the Court deems proper.

DATED this _____ day of September, 1982.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this _____ day of September, 1982, to:

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____
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No. 83-6611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY GIBSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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STATEMENT OF THE CASE

Petitioner, Thomas Henry Gibson, was convicted of murder in the first degree for the killing of Kimberly Ann Palmer. Gibson attempted to exclude any evidence concerning the death of a second individual, Scott Currier (based upon Gibson's prior acquittal in Washington of Currier's murder). The trial court held the evidence admissible to portray a "rational and cohesive scenario" and denied the motion. During the trial, Gibson continued to object to the introduction of certain evidence concerning Currier's death. These objections were generally overruled and the evidence admitted. See, State v. Gibson, 675 P.2d 33 (Idaho 1983).

Following his conviction, the trial court sentenced Gibson to death. Idaho law provides that the trial court, without the participation of the jury, shall make sentencing decisions in capital prosecutions. Idaho Code, § 19-2515.

Except for the third issue raised by petitioner, the issues of this case are identical to those of Paradis v. Idaho, No. 83-6653, which is now before this Court on a petition for a writ of certiorari. Both cases arise from the same facts.

SUMMARY OF ARGUMENT

1. The admission, in an Idaho murder prosecution, of evidence tending to show that petitioner had committed a different but related murder in the State of Washington, of which murder petitioner was acquitted in Washington, did not violate the Double Jeopardy Clause of the United States Constitution. The evidence was relevant. The Fifth Amendment does not bar even a second trial for the same conduct by a different, separate sovereign, even though the accused was acquitted in the first prosecution. The well-established dual-sovereignty doctrine precludes the theory that evidentiary use of other-crime evidence related to an offense of which the accused was acquitted violates federal constitutional guarantees. There is no conflict among lower courts relating to federal questions in this area of law.

2. There is no federal constitutional requirement that juries must participate in capital sentencing decisions. The Cruel and Unusual Punishment Clause speaks to different concerns. This Court has repeatedly upheld capital sentencing statutes which authorize judges, rather than juries, to make final decisions respecting the imposition of capital punishment.

3. Enmund v. Florida, 458 U.S. 782 (1982), does not prohibit imposition of the death penalty on one who is found guilty of a crime because he has aided and abetted another in the commission of the crime.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

Petitioner's Conviction Was Not Based on Evidence Admitted in Violation of the United States Constitutional Provision Protecting the Accused from Being Placed Twice in Jeopardy.

Petitioner maintains that his acquittal in the State of Washington of the murder of a different victim, Scott Currier, brought into operation a federal constitutional bar to the use of evidence of the Washington offense in petitioner's Idaho prosecution for the murder of Kimberly Ann Palmer.

The crime described by the evidence, although a separate offense, was not "unrelated." Rather, the facts admitted relating to the Scott Currier murder in Washington were an inherent part of the continuing transaction resulting in the murder of Kimberly Palmer--i.e., a part of the "whole picture." The evidence tended to show that Currier was murdered in the State of Washington, in the presence of Kimberly Ann Palmer, and that Palmer was later killed to protect Paradis and his accomplices from the possibility that Palmer might become a witness against them. See, State v. Paradis, 676 P.2d 31 (Idaho 1983).

As a general rule in Idaho and other jurisdictions, otherwise competent evidence of other unrelated crimes by a defendant is not admissible to show that the defendant is guilty of the crime charged. It is thought that evidence of mere criminal disposition is unduly prejudicial and has the capacity to lead the jury to decide the case on emotion instead of evidence that logically creates an inference of guilt. On the other hand, the rule has been extensively and substantially qualified by the following universally adopted exceptions: evidence of other crimes is admissible when, in addition to other situations not relevant here, such

evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) common design, plan, or scheme, and (5) identification of the accused as the person who committed the crime charged. 1 Wharton, Criminal Evidence, §§ 241, 243-249 (13th ed. 1972). These exceptions have been unequivocally recognized by the Supreme Court of Idaho. State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979); State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971).

Moreover, the rule barring other-crime evidence simply does not apply where the other crime precedes, is contemporaneous with, or is a part of the crime charged, and the circumstances surrounding the other crime are necessary to prove or explain the criminal act charged. 1 Wharton, Criminal Evidence, § 242 (13th ed. 1972) (the "whole picture" rule). The Supreme Court of Idaho recognized this principle in State v. Izatt, 96 Idaho 667, 534 P.2d 1107 (1975), and gave the following rationale for its decision:

> The state is entitled to present a full and accurate account of the circumstances of the commission of the crime, and if such an account also implicates the defendant or defendants in the commission of other crimes for which they have not been charged, the evidence is nevertheless admissible. The jury is entitled to base its decision upon a full and accurate description of the events concerning the whole criminal act, regardless of whether such a description implicates a defendant in other criminal acts. 96 Idaho at 670, 534 P.2d at 1110.

The quoted language clearly underscores as well as approves the strong public interest in enforcement of the criminal law, including effective prosecution and jury deliberations. See, generally, Standefer v. United States, 477 U.S. 10 (1980), for a discussion of this interest in the context of a decision not to impose nonmutual collateral estoppel against the government in a criminal case.

Thus, the constitutional theory put forward here by the petitioner would have this Court reject the public interest

in effective prosecution and having the whole picture reviewed by the trier of fact because the accused had been acquitted of the other crime prior to the relevant prosecution. Petitioner's contention ignores the substantial, probably majority, body of law supporting the proposition that otherwise competent evidence of another crime is not rendered inadmissible because the accused was acquitted of such crime. See, e.g., 1 Wharton, Criminal Evidence, § 262 (13th ed. 1972, and Supp. 1982 and cases cited therein); Annot., 86 A.L.R. 2d 1132 (1962, Later Case Service 1979, and Supp. 1982); Cleary, McCormick on Evidence, § 190 (2d ed. 1972); note, "Expanding Double Jeopardy: Collateral Estoppel in the Evidentiary Use of Prior Crimes in Which the Defendant Has Been Acquitted," 2 Fla.St.U.L.Rev. 511, 522-524 (1974).

Petitioner's position that the otherwise competent and relevant evidence relating to the murder of Scott Currier in Washington was unconstitutionally admitted in evidence is based on the contentions that: (1) admission violated the Fifth Amendment guarantee against double jeopardy (appellant cites Ashe v. Swenson, 397 U.S. 436 (1970) and Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), in support of this contention); (2) admission was barred by the doctrine of collateral estoppel, which has been applied by this Court to the Fifth Amendment guarantee against double jeopardy (Ashe v. Swenson, supra, and Wingate v. Wainwright, supra); and (3) there are conflicts in the decisions of lower state and federal courts respecting the admissibility of evidence of other offenses of which the defendant has been acquitted.

Appellant's arguments, and his reliance on the previously-cited authority, are misplaced. Not only should the previously-mentioned authority upholding the admissibility of evidence of other crimes despite acquittal be

considered a constitutionally permissible application of rules of evidence, but this case differs fundamentally from appellant's authority.

The first and clearly determinative distinction between petitioner's authority and this case is that in every case cited by petitioner the same state or sovereign first prosecuted the accused (for the crime of which the accused was acquitted) and then reprosecuted the accused for the same conduct or introduced evidence of the prior crime in a subsequent prosecution for a different crime. In this case, petitioner was first prosecuted by the State of Washington for Scott Currier's murder and then prosecuted by the State of Idaho for Kimberly Palmer's murder. As set forth in the Opinion of the Supreme Court of Idaho, State v. Paradis, supra, the evidence of the crimes was so intertwined that part of the circumstantial evidence relating to Currier's murder was also related to, and necessary to explain, Palmer's murder. It was in the later prosecution in Idaho, not Washington, that the issue of admissibility of evidence relating to another crime arose. Consequently, there were different sovereign states involved in the relevant two prosecutions. This distinction renders inapplicable, indeed erroneous, the very reasoning upon which petitioner relies.

Clearly, the Fifth Amendment guarantee against double jeopardy does not bar a second trial for the same conduct by a different, separate sovereign, even though the accused was acquitted or convicted in the first prosecution. Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959) (state prosecution followed by federal prosecution); United States v. Wheeler, 435 U.S. 313 (1978) (Indian tribal court prosecution followed by federal prosecution); Pope v. Thone, 671 F.2d 298 (8th Cir. 1982)

(federal prosecution followed by state prosecution); Perry v. United States, 514 F.Supp. 156, D.N.J. 1981 (federal prosecution followed by state prosecution); and State v. Russell, 229 Kansas 124, 622 P.2d 658 (1981) (successive prosecutions by two states). See, also, 1 Wharton, Criminal Law, § 17 at 126 (1972). Bartkus, supra, and Abbate, supra, as well as their progeny, rest on the basic structure of our federal system. The exercise of power of one sovereign should not usurp the right of another sovereign to exercise its power.

Successive prosecutions by separate sovereigns are sanctioned by the dual-sovereignty doctrine in recognition that "a single act may constitute separate and distinct offenses against two sovereigns, punishable by both." United States v. Brown, 604 F.2d 557 (8th Cir. 1979). Consequently, with reference to a paraphrased statement of the Fifth Amendment, the accused is not twice placed in jeopardy for the same offense. Two offenses are involved--one against each sovereign. Wheeler, supra, 435 U.S. at 317-318.

Ashe v. Swenson, supra, reduced to its simplest terms, represents a classic double jeopardy fact pattern where the same sovereign reprosecutes the accused for the same conduct after acquittal--in particular, relitigating the precluded issue of the accused's participation in the relevant robbery. The other case cited by appellant in support of the double jeopardy argument, Wingate v. Wainwright, supra, involved the same sovereign that had first prosecuted the accused for several robberies, subsequently using the evidence of the earlier robberies in a prosecution for a later unrelated robbery. The challenged testimony of the eye witnesses to the other robberies, of which the accused had been acquitted, was offered to show course of conduct.

The Court reasoned that such testimony placed the accused in the position of again being compelled to defend his innocence of the other robberies, and thus he was in effect twice placed in jeopardy for the same offense by the same sovereign. Clearly, these cases cited by petitioner do not reverse or put into question the dual-sovereignty doctrine. As separate sovereigns are involved in the case at hand, Idaho would not have been precluded by the Fifth Amendment from reprosecuting appellant for Scott Currier's murder after the Washington prosecution. Consequently, the Fifth Amendment does not bar the evidentiary use of the facts of Currier's murder, which arguendo, according to Wingate has the same impact as reprosecution for the same conduct. In other words, Ashe incorporated collateral estoppel into double jeopardy as an inherent ingredient, and not as an expansion of the constitutional guarantee. Note, Expanding Double Jeopardy: Collateral Estoppel in the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted, 2 Fla.St.U.L.Rev. 511, 531, n.91 (1974).

The distinction that separate sovereigns were involved in this case is equally determinative of the issue whether collateral estoppel is applicable. Although some dispute exists over the wisdom of, and the prerequisites for, applying the collateral estoppel doctrine in criminal prosecutions, it is commonly accepted that, similar to the same sovereign requirement for the guarantee against double jeopardy, identity of parties, including the prosecuting governmental entity, is required. An acquittal in one criminal case operates as collateral estoppel in another criminal case only where the parties to both proceedings are identical. It is fundamental that the governmental entity against which estoppel is sought must have been a party to the initial prosecution. The State of Idaho is not the same

sovereign as the State of Washington, and thus is not barred by collateral estoppel. United States v. Smith, 446 F.2d 200 (4th Cir. 1971); Annot. 9 A.L.R. 3d 203, 215-218 (1966 and Supp. 1982); Restatement (2d) of Judgments, §§ 27, 28, 34 (1982); 1 Wharton, Criminal Law, § 72 (14th ed. 1978).

Although the stranger to the judgment of acquittal was the defendant rather than the prosecuting attorney in Standefer v. United States, supra, the decision of this Court not to impose collateral estoppel against the prosecuting governmental authority seems relevant to this inquiry. In Standefer, the conviction of an aider and abetter was affirmed despite the prior acquittal of the alleged perpetrator of the offense. Both prosecutions were by the same governmental entity. In refusing to give force to nonmutual collateral estoppel against the government, the Court distinguished a criminal case from the civil case which had approved nonmutual collateral estoppel, noting that in a criminal case the government is frequently without the "full and fair opportunity to litigate," which is the underlying assumption of estoppel. The Court listed as bases for this observation the special limits or prohibitions applicable to a criminal case concerning discovery, admission of evidence, judgment notwithstanding a verdict, new trial, and appellate review. It might also have listed the more difficult burden of proof imposed in criminal cases. In conclusion, the Court stated that "competing policy considerations" outweighed the policies undergirding the estoppel doctrine, quoting the following language from the opinion of the Court of Appeals:

> "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is

> greater than the concern for traditional economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interest of the courts, nor the public. 447 U.S. at 25.

The emphasis and priority given the public interest in criminal cases appears equally pertinent to, and persuasive in, this proceeding.

The conclusion that collateral estoppel should not be applied where there is a lack of identity of the prosecuting authority necessarily involves the conclusion either that it is not unfair to the adverse party to allow the second prosecuting authority to proceed or that the unfairness of precluding the second authority is of greater concern than any unfairness to the adverse party. Preclusion in this case would be particularly unfair given the high probative value of the admitted evidence and the strong, legitimate interest in presenting the "whole picture" to the trier-of-fact. In effect, petitioner in his attempt to deprive the jury of the "whole picture" deviously seeks to avoid absolutely any accountability or prosecution for a murder in Idaho--an offense against the people of Idaho--based upon the prosecution brought by Washington for a different murder. Fairness does not mandate such a ridiculous result.

Even if it were assumed for the purpose of argument that the same sovereign was involved in both prosecutions, respondent contends that the normal standard for admissibility of evidence could constitutionally be applied. The question should be whether the probative value of the evidence outweighs its prejudicial impact. Acquittal should not be an absolute bar to admission. Oliphant v. Koehler,

594 F.2d 547 (6th Cir. 1979); United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972); Ladd v. State, 568 P.2d 960 (Alaska 1977); 1 Wharton, Criminal Evidence, § 262 (13th ed. 1972 and Supp. 1982 and cases cited therein); Annot. 86 A.L.R. 2d 1132 (1962, Later Case Service 1979 and Supp. 1982); Cleary, McCormick on Evidence, § 190 (2d ed. 1972).

The petitioner was appropriately afforded protection against any potential prejudice in this case by the court's jury instruction that evidence of other crimes was to be considered:

> [O]nly for the limited purpose of determining if it tends to show a motive for the commission of the crime charged and the existence of the intent which is a necessary element of the crime charged, and the identity of the person charged with the crime which is on trial. (Trial Tr. Vol. 5, p.677.)

The cases cited by petitioner do not address the dual-sovereignty aspect of this case, and respondent perceives no basis for the argument that there exists a conflict in the decisions of lower courts which should be resolved by this Court. Petitioner also contends that there is a conflict among the decisions of lower courts because some states hold that other crime evidence impacts the admissibility of such evidence as that in the present case, while others hold that evidence of other crimes of which the accused is committed involves the weight of the evidence rather than its admissibility. The cases cited by the petitioner do not conflict in the interpretation of principles of law arising under the United States Constitution. These conflicts are conflicts related to matters of state law, or, in the federal courts, to issues different from that presented here. They do not present a proper federal question for the consideration of this Court.

II.

Whether a Capital Sentence Shall Be Imposed by a Judge or by a Jury is a Matter of Legislative Discretion and is Not Controlled by Rule of Constitutional Law.

Petitioner contends that there is a conflict among lower courts respecting the constitutionality of a sentencing scheme in capital cases that does not involve jury participation. He argues that the conflict should be resolved by this Court and presents the proposition as a reason for granting his petition for certiorari. However, the case cited by petitioner, State v. Quinn, 623 P.2d (Or. 1981), was decided on state constitutional grounds and did not involve a conflicting interpretation of the United States Constitution.

Petitioner argues that the trial is not terminated until the sentencing hearing has been held, wherefore the right to a "trial" by an impartial jury, guaranteed by the Sixth Amendment to the Constitution of the United States, requires jury participation in capital sentencing. He also asserts that the jury is necessary "to maintain a link between contemporary community values and the penal system," Gregg v. Georgia, 428 U.S. 153, 190 (1976), a theory related to the Cruel and Unusual Punishment Clause.

The argument that somehow "evolving community values" must be reflected in capital sentencing confuses the basic question of whether the death penalty is, itself, cruel and unusual punishment with the totally unrelated question of whether there is some constitutional ground for the proposition that the death penalty can be imposed by none other than a jury. It is a novel argument that jury sentencing is constitutionally required in capital cases by the operation of the Cruel and Unusual Punishment Clause. The "evolving standards of decency" referent of those cases which stand for the principle that the Cruel and Unusual Punishment

Clause of the Eighth Amendment is to be applied by considering the extent to which public opinion has come to regard a particular kind or quality of punishment as abhorrent has nothing to do with who shall decide punishment. This Court has stated:

> [T]hat the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, '[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, supra, at 101 ... . Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. ... Gregg v. Georgia, 428 U.S. at 173.

It is apparent that the Court, in considering whether a particular penalty does not comport with the "evolving standards of decency that mark the progress of a maturing society," has been in each case concerned with the quality of the penalty provided and not with the identity of the sentencing authority. See, for example, Gregg v. Georgia, supra (capital punishment); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization); Robinson v. California, 370 U.S. 660 (1962) (imprisonment for status of being addicted to narcotics); Weems v. United States, 217 U.S. 349 (1910) (imprisonment in chains at hard and painful labor); Francis v. Resweber, 329 U.S. 459 (1947) (second attempt at electrocution).

The limitations on Cruel and Unusual Punishment Clause analysis reflected in the foregoing cases is a predictable result of the language of the clause, which is addressed to the appropriateness of particular penalties:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Constitution Amendment VIII. (Emphasis added.)

Consistently, the Cruel and Unusual Punishment Clause has been relevant to the assessment of barbarous methods of punishment and, as the clause has taken on new meaning with

the advancement of social conscience, to methods and varieties of punishment that are offensive in light of contemporary values. Gregg, supra.

If petitioner were correct, one would expect the Cruel and Unusual Punishment Clause to read:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, nor capital sentences inflicted without meaningful community participation.

The clause does not read that way, and to achieve the result petitioner seeks would require writing into it a new principle. Nothing in the history of the clause as it has been interpreted in this Court suggests that it has any relevance to this issue.

Nevertheless, the petitioner urges that the meaning of the clause must now be expanded to regulate a state legislature's choice of sentencing authority. In doing so, he ignores the following admonition of this Court that mirrors a basic principle of division of powers:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, supra, at 383 (Burger, C.J., dissenting). Gregg v. Georgia, 428 U.S. at 175. (Emphasis added.)

In the final analysis, whether the death penalty is imposed by a judge or a jury has nothing to do with whether the penalty is cruel and unusual. Moreover, there is no empirical evidence that judicial sentencing is more likely to result in arbitrary or capricious sentencing decisions

than jury sentencing. Indeed, it has been suggested that the opposite is true:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function [citations omitted], but it has never suggested that jury sentencing is constitutionally required, and it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analagous cases. Proffit v. Florida, 428 U.S. 242, 252 (1976), reh. den. 429 U.S. 875. (Emphasis added.)

Although this Court has not directly considered the question of whether jury sentencing is a constitutional requirement, the Court's opinions contain unmistakable indications that no such mandate is a part of the Constitution. The above-quoted language from Proffit v. Florida, supra, is such an indication. In Dobbert v. Florida, 423 U.S. 282 (1977), reh. den. 434 U.S. 882, the Court reviewed a case in which the trial judge overruled the jury recommendation for a life sentence and sentenced the defendant to death, and upheld the Florida death penalty statute. Although the Court was concerned with whether the statute violated the ex post facto clause, it is significant that the Court found, in the process of determining that the statute was ameliorative and thus not violative of the ex post facto clause, that defendants sentenced under the new statute were not significantly disadvantaged because pursuant to it, "unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court." 432 U.S. 282 at 296. It seems unlikely to respondent that this Court, having once found a judicial sentencing statute constitutional because it was less onerous than a jury

sentencing statute, would now be prepared to hold that evolving standards of decency demand jury sentencing.

Petitioner suggests that Dobbert v. Florida, supra, differs substantially from the questions raised by the Idaho statute inasmuch as the jury had, at least, a chance to express an opinion about the penalty under the Florida sentencing scheme (meaningful community participation). While that may be true, the circumstance was that the trial judge utterly overruled the jury determination and substituted his own, as authorized by the Florida statute, and was upheld in doing so by this Court. The process was one which cancelled out the jury's participation and, for constitutional purposes, respondent is unable to fathom any distinction between no jury participation and jury participation which can be made to count for nothing. Although it is true that the Florida scheme authorizes the jury to express an opinion, which might be expected to have some effect on the judge, there is no existing authority for the proposition that the difference is a matter of constitutional importance.

The constitutionality of Florida's sentencing procedure has received extensive attention from the Florida Supreme Court as well as from this Court. See: Washington v. State, 362 So.2d 658 (Fla. 1977), cert. den. 441 U.S 937 (1979); Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. den. 428 U.S. 911 (1976), reh. den. 429 U.S. 873 (1976); Gardner v. State, 313 So.2d 675 (Fla. 1975), reversed on other grounds, 430 U.S. 379 (1977); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. Florida, supra; Barclay v. State, 343 So. 2d 1266 (Fla. 1977), reversed on other grounds 362 So. 2d 657, cert. den. 439 U.S 892 (1978); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den. 439 U.S 920.

One significant sign of this Court's disinclination to consider jury sentencing a constitutional mandate appears in Justice Rehnquist's opinion as a circuit justice in Richmond v. Arizona, 434 U.S. 1323 (1977), reh. den. 434 U.S. 976 (1977), in which he ruled that a criminal defendant had no constitutional right to have a jury find facts in aggravation or mitigation of punishment and remarked that "Such jury input would not appear to be required under this Court's decision in Proffit." 434 U.S. at 1325. Where the Court has overturned judicially imposed sentences, the decisions rested not on who the sentencing authority was, but on how the sentencing authority's discretion was exercised. Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Appellant suggests that judges cannot adequately reflect community values in the capital sentencing process. Apart from the fact that this analysis, which proceeds from the Cruel and Unusual Punishment Clause cases, has no applicability to the question of who the sentencing authority shall be, its assumption is incorrect.

The contemporary values of the community are reflected in the capital sentencing statutes enacted by the elected representatives of the community, and to a greater extent than jury sentencing would make possible. In the capital sentencing process the judge is restricted almost entirely by those values. He may not impose the death penalty unless he does so upon an aggravating factor specifically identified by the state legislature. Gregg v. Georgia, supra, and the related line of cases speak entirely to the question of whether the selection of the death penalty, by a legislature, is consistent with contemporary standards of decency. None of those cases contains even the slightest suggestion

that the Cruel and Unusual Punishment Clause was meant to test judicial sentencing.

Moreover, the right of the defendant to present all relevant mitigating evidence insures that the death sentencing decision will be based on a full exposition of evidence about the character of the offender, and that, in itself, is considered to be a factor leading to death sentencing decisions on an individualized basis as required by contemporary values as they apply to the capital sentencing process.

It can hardly be gainsaid that the Constitution not only does not require that a jury of twelve persons, which has never been considered in the law to be a representative policy-making body, be allowed to make unguided decisions that the death penalty does or does not comport with "responsible public views," it does not permit such practice. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, supra.

On the other hand, if the sentencing process is guided by statutory factors, as it is, it would appear that a judge rather than a jury is in a better position to insure that death sentences are uniformly imposed, free from factors of whimsy and arbitrariness. It seems to have been the impression of this Court that jurors' lack of experience in sentencing matters was one of the factors responsible for the capricious results that arose out of unguided discretion in sentences imposed by juries:

> Since the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. ... To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance. ... Gregg v. Georgia, 428 U.S. at 192.

If that be the case, judicial sentencing more nearly addresses the Court's concern about arbitrary and capricious sentences than does jury sentencing.

Appellant lastly argues that Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, 448 U.S. 38 (1980), are authorities for the proposition that the jury should be involved in capital sentencing decisions. Witherspoon was concerned with controls on those functions that juries are expected to perform. The case can hardly be thought of as authority for the different proposition that juries are constitutionally expected to make capital sentencing decisions.

III.

A Capital Sentence May Constitutionally Be Imposed upon One Who is Guilty of a Capital Offense by Virtue of His Status as an Aider and Abettor; This Issue Was Not Raised in the State Courts.

Petitioner argues that the evidence supporting the sentencing court's finding of a statutory aggravating factor was not constitutionally sufficient. Petitioner attempts to transform what appears to be a simple factual question into a constitutional issue by making the argument that this Court's decision in Enmund v. Florida, 458 U.S. 782 (1982), precludes imposition of the death penalty in the factual circumstances presented by petitioner's case.

The first response to this argument must be that the petitioner did not present the question to the Idaho Supreme Court, nor did that court consider it. State v. Gibson, 675 P.2d 33 (Idaho 1983). Accordingly, the question is not properly before this Court for consideration. Street v. New York, 394 U.S. 576 (1969); Bailey v. Anderson, 326 U.S. 203 (1945); Michigan v. Tyler, 436 U.S. 499.

Moreover, Enmund v. Florida does not stand for the proposition that one who aids and abets in the commission of a capital offense may not be subjected to capital punishment because of his status as an aider and abettor.

Idaho law defines aiders and abettors as principals in the commission of criminal offenses. Idaho Code § 18-204. State v. Paradis, 676 P.2d 31 (Idaho 1983). Thus, one who aids and abets in the commission of an offense, or advises and encourages its commission, is liable for the offense in the same manner as the person who directly commits the overt act constituting the offense. Idaho Code § 18-204. State v. Paradis, supra. In this case, the evidence was to the effect that the murder of Kimberly Ann Palmer was carried out by Gibson, Donald M. Paradis, who was also convicted of the offense, and a third person. Although each of the actors involved in the commission of the crime was shown to have taken affirmative steps to facilitate its commission, there was no evidence as to which actually strangled Kimberly Ann Palmer to death. Nonetheless, the circumstantial evidence which led to the convictions of Gibson and Paradis showed them to have been equally culpable in the commission of the offense. The district court made specific factual findings with respect to the evidence against the petitioner. The findings reflect the court's careful consideration of all of the evidence and the court's conclusion that Gibson and two other persons participated with equal culpability in the murder of Kimberly Ann Palmer without provocation and for no very compelling reason.

The states have authority to make aiders and abettors equally responsible, as a matter of law, with principals. Lockett v. Ohio, 438 U.S. 586 (1978). See, also, Standefer v. United States, supra.

The trial court made no constitutional error in imposing the death penalty on Gibson, even as an aider and abettor in the commission of the crime of first degree murder.

In Enmund v. Florida, 454 U.S. 939 (1982), the Court held that the death penalty was constitutionally excessive when imposed on one who aided and abetted a felony, in the course of which a murder was committed by others, but who did not himself kill, attempt to kill, or intend that a killing take place. The facts of Enmund are distinguishable. There was no showing of an intent to kill in that case, whereas in petitioner's case the evidence affords a basis for an inference that all of the principals were equally culpable. Petitioner participated in the planning of the murder, he intended that a killing take place, and he aided and abetted in the premeditated murder which actually occurred. See, State v. Gibson, supra. The Court held in Enmund, by implication, that an aider and abettor who intends that a killing take place, even though not directly involved in the actual killing, may be subjected to the penalty of death.

In Lockett v. Ohio, supra, the Court held that where a statute did not permit the sentencing judge to consider as mitigating factors in imposing the death penalty the defendant's lack of specific intent to cause death, and the defendant's role as an accomplice, the statute violated the Eighth Amendment. In Lockett the defendant aided and abetted in the offense by driving a "get-away car" to transport the principals away from the scene of a felony during the commission of which a homicide took place. The Court concluded that the absence of direct proof that the defendant intended to cause the death of the victim and the defendant's comparatively minor role in the offense could

constitute mitigating factors which would militate against imposition of the death penalty. Again, by implication, the case can be read for the proposition that under certain circumstances, namely, where the defendant intended that a killing take place, an aider and abettor may receive the death penalty. See, also, State v. Paradis, supra; Mack v. United States, 326 F.2d 481 (8th Cir. 1964) (an aider and abettor stands in the shoes of the principal for punishment purposes).

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Idaho should be denied.

DATED this 23d day of May, 1984.

Respectfully submitted,

LYNN E. THOMAS
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Attorney for Respondent

No. 83-6611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS HENRY GIBSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

CERTIFICATE OF MAILING

I, LYNN E. THOMAS, counsel of record for respondent, The State of Idaho, do state under oath, pursuant to Rule 28.2, that the original of the accompanying respondent's RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO was placed in the United States mail on May 23, 1984, first class postage affixed, at Boise, Idaho, addressed to:

Alexander Stevas
Clerk of the Court
U. S. Supreme Court
Washington, DC 20543

Lynn E. Thomas

LYNN E. THOMAS

SUBSCRIBED AND SWORN TO before me this 23d day of May, 1984.

Elsie M. O'Leary

Notary Public for Idaho
Residing at Boise

CERTIFICATE OF MAILING

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23 day of May, 1984, served a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO, by placing same in the United States mail, first class postage prepaid, addressed to Michael J. Vrable, Esq., 307 Elder Building, Coeur d'Alene, Idaho 83814, counsel of record for petitioner.

Lynn E. Thomas

LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF SERVICE

END OF DOCKET